Docket for 05-260

(16)

No. 05-260
Title: Joel Sereboff, et ux., Petitioners
v.
Mid Atlantic Medical Services, Inc.
Docketed: August 29, 2005
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (04-1336, 04-1403, 04-1722)
Decision Date: May 4, 2005
Rehearing Denied: June 1, 2005
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Aug 25 2005	Petition for a writ of certiorari filed. (Response due September 28, 2005)
Sep 13 2005	Waiver of right of respondent Mid Atlantic Medical Services, Inc. to respond filed.
Sep 21 2005	DISTRIBUTED for Conference of October 7, 2005.
Sep 27 2005	Response Requested . (Due October 27, 2005)
Oct 27 2005	Brief of respondent Mid Atlantic Medical Services, Inc. in opposition filed.
Nov 9 2005	DISTRIBUTED for Conference of November 23, 2005.
Nov 9 2005	Reply of petitioners Joel Sereboff and Marlene Sereboff filed. (Distributed)
Nov 28 2005	Petition GRANTED.
Jan 6 2006	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including January 19, 2006.
Jan 11 2006	Consent to the filing of amicus briefs in support of ither party received from counsel for the respondent.
Jan 13 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Jan 19 2006	Joint appendix filed.
Jan 19 2006	Brief of petitioners Joel Sereboff and Marlene Sereboff filed.
Jan 19 2006	Brief amicus curiae of Association of Trial Lawyers of America filed.
Jan 23 2006	SET FOR ARGUMENT on Tuesday, March 28, 2006.
Feb 7 2006	CIRCULATED.
Feb 10 2006	Record received from U.S.C.A. 4th Circuit. (1 envelope)
Feb 15 2006	Record received from U.S.D.C. for District of Maryland. (1 envelope)
Feb 17 2006	Brief amicus curiae of Central States, Southeast and Southwest Areas Health and Welfare Fund filed. (Distributed)
Feb 22 2006	Brief of respondent Mid Atlantic Medical Services, Inc. filed. (Distributed)
Feb 23 2006	Brief amicus curiae of United States filed. (Distributed)
Feb 23 2006	Brief amicus curiae of National Association of Subrogation Professionals filed. (Distributed)
Feb 23 2006	Brief amicus curiae of Southwest Carpenters Health & Welfare Trust filed. (Distributed)
Feb 23 2006	Brief amicus curiae of National Coordinating Committee for Multiemployer Plans filed. (Distributed)
Feb 23 2006	Brief amicus curiae of Blue Cross Blue Shield Association filed. (Distributed)
Feb 23 2006	Brief amicus curiae of Self-Insurance Institute of America, Inc. filed. (Distributed)

Feb 23 2006	Brief amici curiae of Society for Human Resource Management and the Chamber of Commerce of the United States of America filed. (Distributed).
Feb 23 2006	Brief amici curiae of America's Health Insurance Plans, Inc., et al. filed. (Distributed)
Mar 6 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 17 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 21 2006	Reply of petitioners Joel Sereboff and Marlene Sereboff filed. (Distributed)
Mar 28 2006	Argued. For petitioners: Peter K. Stris, Costa Mesa, Cal. For respondent: Gregory S. Coleman, Austin, Tex.; and James A. Feldman, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for the United States, as amicus curiae.)

SUPREME COURT, U.S.
FILED
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No. 05-

IN THE

Supreme Court of the United States

JOEL SEREBOFF and MARLENE SEREBOFF,

Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

As the Court of Appeals recognized below, this case squarely presents a question that is the subject of a four-to-two circuit conflict and that was addressed but left open by this Court in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). As the federal government has noted, the question is of extreme national importance and likely affects over $1 billion annually.

The Question Presented is:

Can a plan fiduciary bring a civil action against a plan participant to obtain "appropriate equitable relief" under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(3), where a term of the plan requires the participant to reimburse medical expenses advanced by the plan if the participant recovers money from a third-party tortfeasor and possesses such payments in an identifiable fund?

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Ohio Rev. Code. Ann. § 2744.05(B)	4
Va. Code § 38:2-3405	4

Other Authorities:

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Petitioners Joel and Marlene Sereboff respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fourth Circuit (Pet. App. 1a-19a) is published at 407 F.3d 212. The order of the district court granting summary judgment in favor of respondents (Pet. App. 24a-45a) is published at 303 F. Supp. 2d 691. The order of the district court granting attorneys' fees (Pet. App. 20a-23a) is published at 316 F. Supp. 2d 265.

STATEMENT OF JURISDICTION

The U.S. Court of Appeals for the Fourth Circuit denied a timely petition for rehearing and suggestion for rehearing *en banc* (Pet. App. 46a-47a) on June 1, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 502 of the Employee Retirement Income Security Act of 1974, (hereinafter, "ERISA"), 29 U.S.C. § 1132, as amended, provides in relevant part:

> (a) Persons empowered to bring a civil action.
>
> A civil action may be brought—
>
> * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to

redress such violations or (ii) to enforce any provisions of this title or the terms of the plan; . . . .

* * * *

STATEMENT OF THE CASE

1. ERISA is a federal statute that regulates employee pension and welfare plans. "An employee welfare-benefit plan or welfare plan is defined as one which provides to employees 'medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability [or] death,' whether these benefits are provided 'through the purchase of insurance or otherwise.'"[1] As of 2002, 137 million workers, retirees, and their families (*i.e.*, participants) were covered by one of the 2.5 million private sector employer-sponsored welfare plans governed by ERISA.[2] In fact, almost all health insurance in the United States—except for Medicare—is provided through employer-sponsored plans and is thus subject to ERISA.[3]

When a participant in an ERISA welfare plan is injured (*e.g.*, in an automobile accident), she will receive money from the plan (or its insurer) to pay for her medical expenses. The participant also may bring a personal injury lawsuit for money damages (including the recovery of medical expenses) against any third party who might have been responsible for her

[1] *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985) (quoting Section 3(1) of ERISA, 29 U.S.C. § 1002(1)).

[2] *See* Brief of the Secretary of Labor as *Amicus Curiae* in Support of Qualchoice's Petition for *En Banc* Rehearing in *Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (CA6 2004) (hereinafter, "Brief of the Secretary of Labor").

[3] *See* Lorraine Schmall & Brenda Stephens, *ERISA Preemption: A Move Towards Defederalizing Claims for Patients' Rights*, 42 Brandeis L.J. 529, 538 (2004).

injuries. For this reason, plan managers (*i.e.*, fiduciaries) commonly require that every plan participant contractually agree to reimburse medical expenses out of any personal injury settlement or judgment that she might recover.[4] According to available data, "[m]illions and potentially billions of dollars are recouped annually by health plans and insurers by virtue of subrogation and other recovery mechanisms."[5]

For years, there has been an intense judicial struggle over whether or not ERISA permits a plan fiduciary to commence litigation in federal court to enforce these contractual reimbursement clauses. The answer to this jurisdictional question is exceedingly important because some

> states have flatly rejected, either by court decision or statute, the extension of subrogation actions into the realm of personal injury claims [and t]he majority of states . . . agree that an insurer is not entitled to share in a policyholder's recovery from a tortfeasor until the policyholder has been fully compensated for her loss.[6]

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[4] The right created by such a contractual provision is often referred to as a "subrogation" right to reimbursement.

[5] Brief filed on behalf of the American Associations of Health Plans, the Blue Cross Blue Shield Association, the Chamber of Commerce of the United States, and the Health Insurance Association of America at p. 10 in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (No. 99-1786).

[6] David Leishman, *Note, Adding Insult to Injury: ERISA, Knudson, and the Error of the Possession Theory*, 89 Minn. L. Rev. 1214, 1216-17 (2005). *See also* Cal. Civ. Code § 3333.1(b); La. R.S. § 22:663;

(Cont'd)

2. Whether or not a plan fiduciary may commence litigation in federal court to enforce a contractual reimbursement clause turns entirely on the interpretation of Section 502(a)(3) of ERISA.[7] Among other things, this section authorizes a plan fiduciary to seek "appropriate equitable relief" to enforce the terms of its plan. Because of the importance of the issue, this Court has twice granted certiorari to interpret the scope of the phrase "appropriate equitable relief" in Section 502(a)(3).

In *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), (hereinafter, "*Mertens*") this Court held that the text of Section 502(a)(3) leaves no doubt that Congress intended "appropriate equitable relief" to include only those types of relief that were typically available in equity. *See Mertens*, 508 U.S. 248. Pursuant to the holding of *Mertens*, for

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(Cont'd)
Ga. Code Ann. § 33-24-56.1; N.J. Stat. Ann. § 2A:15-97; Va. Code § 38:2-3405; 11 N.C.A.C. § 12.0319; 75 Pa. C. S. § 1720; Minn. Stat. § 62A.095; K.A.R. § 40-1-20; Conn. Gen. Stat. § 52-225c; Ohio Rev. Code Ann. § 2744.05(B); 36 Okl. St. § 6092.

[7] Section 502(a) contains the six civil enforcement provisions of ERISA. This Court has repeatedly held that Section 502(a) provides the exclusive remedies to a civil litigant under the statute. *See e.g., Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) ("The six carefully integrated civil enforcement provisions found in section 502(a) of the statute as finally enacted provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) ("The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.").

example, plan fiduciaries could not file garden-variety breach of contract actions in federal court seeking money damages.

After *Mertens*, ERISA plan fiduciaries began to artfully plead such breach of contract claims in an attempt to shoehorn them into *Mertens'* definition of "appropriate equitable relief." In particular, plan fiduciaries tried to enforce their reimbursement clauses by seeking (i) declarations or injunctions stating that a participant must honor such provisions or (ii) the imposition of a constructive trust or equitable lien on any monies received by a plan participant from a third party tortfeasor. Plan fiduciaries argued that they were not seeking money damages for breach of their reimbursement clauses, which would be prohibited by *Mertens*, but rather "appropriate equitable relief" under the statute. Participants, however, countered that such artful pleading was nothing more than an end-run around the holding of *Mertens*.

By 2002, there was a square circuit conflict over whether such lawsuits were permissible under Section 503(a)(3) of ERISA. Recognizing the importance of the issue, this Court granted certiorari in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (hereinafter, "*Knudson*").[8]

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[8] Around the same time, petitions for certiorari were also filed in two other cases that presented the same question as Knudson: *Cement Masons Health and Welfare Trust Fund for Northern California et al. v. Stone*, (No. 99-1403) and *Reynolds Metals Co. v. Ellis*, (No. 99-1787). In response to this Court's order inviting the Solicitor General to express the views of the United States, the federal government filed an *amicus* brief in Cement Masons asking this Court to grant certiorari (and recommending the *Ellis* case as the best vehicle) because "the question presented by this case is of substantial importance to the proper enforcement of ERISA." Brief for the

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The *Knudson* Court began its decision by reiterating the principle that "'equitable relief' in § 502(a)(3) must refer to 'those categories of relief that were *typically* available in equity. . . .'" *Knudson*, 534 U.S at 210 (*citing Mertens*, 508 U.S. at 256). The Court then applied this core principle to each form of relief sought by the plan fiduciary (*e.g.*, an injunction preventing a refusal to reimburse the plan). Despite the plan's attempt to dress the relief it sought in "equitable" language, the Court concluded that what the plan sought was "in essence, to impose personal liability on respondents for a contractual obligation to pay money–relief that was not typically available in equity." *Id.*

The facts of *Knudson*, however, were somewhat unique, and slightly different than, the typical case in which plan fiduciaries seek to enforce reimbursement clauses. In *Knudson*, the plan participant (Janette Knudson) had been rendered a paraplegic. As such, the monies received from the tortfeasor who had caused her accident were in the hands of her attorney and a Special Needs Trust. The plan fiduciary, however, had sued Janette Knudson directly and not her attorney or the trustee.

For this reason, the *Knudson* Court was not required to resolve the question presented in typical ERISA subrogation cases: whether a plan's lawsuit can properly be construed as one for "appropriate equitable relief" under Section 502(a)(3) if the plan sues a participant who is actually in possession of

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(Cont'd)

United States as *Amicus Curiae* in *Cement Masons Health and Welfare Trust Fund for Northern California et al. v. Stone*, (*http://www.usdoj.gov/osg/briefs/2000/2pet/6invit/1999-1403.pet.ami.inv.html*) (last accessed on 8/15/05) (hereinafter, "Brief of the Solicitor General").

the money in question. *See Knudson*, 534 U.S at 220 ("Nor do we decide whether petitioners could have obtained equitable relief against respondents' attorney and the trustee of the Special Needs Trust, since petitioners did not appeal the District Court's denial of their motion to amend their complaint to add these individuals as codefendants.").

This open question provided a glimmer of hope for plan fiduciaries—particularly in light of the Court's recognition, in dicta, that "a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* at 213. In the words of one commentator,

> the stage was set for future litigation. Was the [*Knudson*] Court's denial of a federal remedy for reimbursement under § 502(a)(3)(A) of ERISA a complete foreclosure of the reimbursement effort by ERISA plans? Or could the matter of reimbursement be successfully pursued by an ERISA plan if it were to arise in a different posture?[9]

Relying upon this open question, plan fiduciaries have continued aggressively to pursue their claims for reimbursement against those participants who have obtained personal injury settlements or judgments. These fiduciaries have sought to distinguish *Knudson* by filing their actions against the typical participant who (unlike Janette Knudson)

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[9] Roger M. Baron, *Public Policy Considerations Warranting the Denial of Reimbursement to ERISA Plans: It's Time to Recognize the Elephant in the Courtroom*, 55 Mercer Law Review 595, 600-01 (2004).

has personally received money from a settlement or judgment and who possesses that recovery in an identifiable fund.

This post-*Knudson* litigation has led to another substantial circuit split. Four courts of appeal—including the Fourth Circuit in this case—have held (in published opinions) that an "'exception' to the *Knudson* result occurs when the funds are in the possession and control of a named defendant. This has been termed the 'possession theory' exception to *Knudson*."[10] By contrast, two courts of appeal (in published opinions) have flatly rejected this "exception" to *Knudson*, holding that a claim for money damages, no matter how artfully pleaded, is still not an "equitable" claim.

As the Panel below explicitly noted, the circuit split is squarely presented in this case. Pet. App. 3a. As the district court noted, "the parties [] entered into a comprehensive stipulation of undisputed facts." Pet. App. 27a. These facts—which were attached (Pet. App. 36a-45a) without exhibits to the district court's first order—are as follows:

4. Petitioners Joel and Marlene Sereboff (hereinafter, the "Sereboffs") participated in a self-funded ERISA welfare plan (hereinafter, the "Plan") administered by fiduciary Mid Atlantic Medical Services, Inc. (hereinafter, "Mid Atlantic"). Pet. App. 36a-37a. On June 22, 2000, the Sereboffs were injured in an automobile accident in California. Pet. App. 36a. In connection with the injuries suffered by the Sereboffs in this accident, they received from the Plan a total of $74,869.37 in medical benefits for their accident related injuries. Pet. App. 37a.

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[10] Baron, *supra* note 6 at 611-12.

On August 11, 2000, the Sereboffs filed a personal injury lawsuit in California against various third-parties. Pet. App. 39a. In January of 2003, the Sereboffs settled their California personal injury lawsuit with all parties for $750,000. Pet. App. 44a. The settlement funds were deposited into an investment account controlled by the Sereboffs. Pet. App. 6a. In March of 2003, Mid Atlantic demanded reimbursement from the Sereboffs from their settlement proceeds for the amount paid to them as medical benefits, in accordance with a contractual provision included in the Plan. *See* Pet. App. 38a-39a, 45a. Relying on the post-*Knudson* case of *Westaff (USA), Inc. v. Arce*, 298 F.3d 1164 (CA9 2002) (hereinafter, "*Westaff*"), which prohibits plan fiduciaries from pursuing such claims in the Ninth Circuit, the Sereboffs retained the $74,869.37. Pet. App. 45a.

Likely aware that the *Westaff* decision prohibited it from obtaining reimbursement from the Sereboffs in the Ninth Circuit (*i.e.*, California), Mid Atlantic filed suit *in Maryland* under section 502(a)(3) of ERISA for equitable reimbursement from the settlement proceeds for the medical benefits previously provided to the Sereboffs. On January 26, 2004, a federal district court in Maryland granted Mid Atlantic's motion for summary judgment and ordered the Sereboffs to transfer $74,869.37 plus interest from the partitioned funds held within their investment account to Mid Atlantic (hereinafter, the "Reimbursement Award"). Pet. App. 24a-45a.[11]

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[11] The court reduced this amount by Mid Atlantic's pro rata share of reasonable attorney fees and court costs (hereinafter, the "Deduction Ruling"). Pet. App. 32a. On May 10, 2004, the district court also granted Mid Atlantic's motion for attorneys' fees (hereinafter, the "Attorneys' Fees Ruling"). Pet. App. 20a-22a.

5. On April 6, 2004, the Sereboffs filed a timely appeal to the Fourth Circuit arguing that the relief granted by the district court violated this Court's holding in *Knudson*. The Court of Appeals, however, affirmed the Reimbursement Award.[12] In its opinion, the Fourth Circuit expressly noted the existence of a circuit split on the question presented by the Reimbursement Award (a question that was not addressed by *Knudson*'s holding): "whether a plan fiduciary asserting a subrogation right to reimbursement from a plan beneficiary who has received payments from a third party, and who possesses that recovery in an identifiable fund, is seeking 'equitable relief' under § 502(a)(3) of ERISA." Pet. App.3a

Petitioners timely filed a petition for rehearing and suggestion for rehearing *en banc* which was denied on June 1, 2005. Pet. App. 46a-47a.

This petition followed.

REASONS FOR GRANTING THE PETITION

This case satisfies all of the criteria for Supreme Court review. The Panel below openly acknowledged that there is a deep split among the circuits regarding the Question Presented. *See* Pet App. 3a ("The primary issue on appeal involves application of the Supreme Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 151 L. Ed. 2d 635, 122 S. Ct. 708 (2002), and it is one on which our sister circuits are split.").

As the federal government has repeatedly noted, the Question Presented—on which the circuits are split—is of

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[12] The Fourth Circuit Panel also affirmed the Deduction Ruling but reversed the Attorney's Fees Ruling. Pet. App. 1a-19a.

exceptional importance. Among other reasons, the Question Presented is of manifest importance because it is outcome determinative as to whether or not plan fiduciaries can bring suit in federal court under ERISA to recover what is likely more than $1 billion annually.

The frequent recurrence of this issue and its importance to plan fiduciaries and participants throughout the nation makes the conflict among the circuits untenable. This is particularly true because (as this Court has long recognized) the maintenance of national uniformity is an essential policy underlying ERISA. This case squarely presents the conflict and exemplifies the additional problem of federal forum shopping engendered by this particular circuit split.

Finally, the decision below conflicts with this Court's precedents. Although the Question Presented in this Petition was left open in *Knudson*, this Court's holding in that case set forth a clear rule that was misapplied by the Fourth Circuit here. Briefly put, the remedies sought by respondent in this case cannot constitute "appropriate equitable relief" under Section 502(a)(3) of ERISA because they would not have been traditionally available in a court of equity.

Certiorari therefore should be granted.

I. The Courts of Appeals Are Intractably Divided Over the Question Presented.

The Question Presented is the subject of a four-to-two circuit conflict openly acknowledged by the court of appeals. *See* Pet App. 3a ("The primary issue on appeal involves application of the Supreme Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 151 L. Ed.

2d 635, 122 S. Ct. 708 (2002), and it is one on which our sister circuits are split."). This circuit conflict has repeatedly been recognized by commentators, *e.g.* Baron, *supra* note 6, as well as by the federal government, *e.g.*, Secretary of Labor Brief, *supra* note 2.

1. The Fourth, Fifth, Seventh, and Tenth Circuits have all adopted what has been termed the "possession theory" exception to *Knudson*.[13] These courts of appeal have squarely held that that a plan fiduciary is seeking "appropriate equitable relief" under Section 502(a)(3) of ERISA when the fiduciary asserts a right to reimbursement from a plan participant to recover funds that are (i) specifically identifiable, (ii) belong in good conscience to the fiduciary, and (iii) are within the beneficiary's possession. *Mid Atlantic Med. Svcs., LLC*[14] *v. Sereboff*, 407 F.3d 212 (CA4 2005); *Admin. Comm. of the Wal-Mart Assocs. Health & Welfare Plan v. Willard*, 393 F.3d 1119 (CA10 2004); *Bombardier Aero. Emple. Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348 (CA5 2003); *Admin. Comm. of the Wal-Mart Stores, Inc. v. Varco*, 338 F.3d 680 (CA7 2003).

On the other hand, the Sixth and Ninth Circuits have flatly rejected the "possession theory" exception to *Knudson*. *Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (CA6 2004); *Westaff (USA), Inc. v. Arce*, 298 F.3d 1164 (CA9 2002). These courts of

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[13] "This exception has been termed as the 'possession theory' exception to *Knudson*. Under this theory, *Knudson* would prohibit actions by ERISA plans to seek reimbursement only 'if the insured is not in the possession of clearly identifiable proceeds.'" *Baron, supra* note 6 at 612.

[14] The caption of this opinion appears to mistakenly list Mid Atlantic as a limited liability company (*i.e.*, LLC). Pet. App. 1a. The body of the opinion, however, correctly refers to Mid Atlantic as a corporation (*i.e.*, Inc.). Pet. App. 2a.

appeals have squarely held "that a plan fiduciary's assertion of a subrogation right to reimbursement from a plan beneficiary who has received payments from a third party is legal in nature, *regardless of whether the beneficiary possesses that recovery in an identifiable fund.*" Pet. App. 13a-14a (emphasis added).

2. The circuit conflict will not resolve itself without this Court's intervention. The Sereboffs' case is illustrative. Although the Fourth Circuit explicitly acknowledged the circuit split and the contrary view of the Sixth and Ninth Circuits, the court of appeals nevertheless refused to reconsider its position and denied the Sereboffs' petition for rehearing and suggestion for rehearing *en banc*. Pet. App. 46a-47a.

The respective views of the other courts of appeals are similarly entrenched as evidenced by their denials of petitions for rehearing and suggestion for rehearing *en banc*. *E.g.*, *Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (CA6 2004) *reh'g and sugg. for reh'g en banc denied* (Sept. 10, 2004); *Bombardier Aero. Emple. Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348 (CA5 2003), *reh'g and sugg. for reh'g en banc denied* (Jan. 13, 2004); *Admin. Comm. of the Wal-Mart Stores, Inc. v. Varco*, 338 F.3d 680 (CA7 2003), *reh'g and sugg. for reh'g en banc denied* (Aug. 22, 2003).

The Ninth Circuit has gone so far as to recently reaffirm its rejection of the "possession theory" exception to *Knudson*. *Carpenters Health and Welfare Trust for Southern California v. Vonderharr*, 384 F.3d 667 (CA9 2004) ("[*Knudson*] buttressed rather than overruled our holdings.") (hereinafter, "*Vonderharr*"). On January 31, 2005, a petition for certiorari

was filed in *Vonderharr*.[15] On April 18, 2005, this Court invited the Solicitor General to express the views of the United States on the questions presented in *Vonderharr*—one of which is the precise Question Presented by this Petition. On April 22, 2005, this Court received a Notice that the parties in *Vonderharr* had entered into a settlement agreement. *See id.* This settlement renders the *Vonderharr* case moot.

The circuits' firm commitments to their conflicting views underscore the need for this Court's intervention and the creation of a uniform rule.

II. The Circuit Conflict Is Untenable Given the Importance of the Question Presented.

As the federal government has repeatedly noted, the Question Presented is of exceptional importance. *See e.g.*, Brief of the Secretary of Labor, *supra* note 2 (noting that "[i]n addition to being in conflict with the decisions of other circuits . . . the [Question Presented] is of exceptional importance"); Brief of the Solicitor General, *supra* note 8 ("The question presented by this case is of substantial importance to the proper enforcement of ERISA because it affects the ability of plan fiduciaries to recoup significant amounts of money on behalf of employee benefit trust funds.")[16]

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[15] *See* United States Supreme Court Docket in *Carpenters Health and Welfare Trust for Southern California v. Vonderharr* (02-57183, 03-55296, 03-55312) found at *http://www.supremecourtus.gov/docket/04-1049.htm* (last accessed on 8/17/05).

[16] As the primary authority for the interpretation and enforcement of the provisions of Title I of ERISA, *Donovan v.*

(Cont'd)

The Question Presented is outcome determinative as to whether or not plan fiduciaries can bring suit in federal court under ERISA to recover what is likely more than $1 billion annually. According to the federal government,

> an estimated 137 million people [as of 2002] participated in private sector employer-sponsored health care plans covered by ERISA. Many of these plans contain reimbursement/subrogation provisions. Indeed, in 2000, the largest provider of subrogation services in the United States reported subrogation recoveries that averaged $4.8 million for every one million persons covered by its clients.

Brief of the Secretary of Labor, *supra* note 6 (*citing* Healthcare Recoveries, Inc., SEC Form 10K (Mar. 27, 2001)).[17]

(Cont'd)

Cunningham, 716 F.2d 1455, 1462-63 (CA5 1983), the interests of the Secretary of Labor include promoting uniform application of the Act, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets. *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682 (CA7 1986) (*en banc*). The Secretary is interested in the outcome of the Question Presented because he believes that "[t]he plans' ability to seek reimbursement of benefits from plan participants who have recovered funds from third parties is important to plans' continued financial stability." Brief of Secretary of Labor, *supra* note 2. To be clear: although Petitioners agree with the United States that the Question Presented is of exceptional importance, Petitioners disagree with the government regarding the proper answer to the Question Presented (i.e., on the merits).

[17] Healthcare Recoveries is just one—albeit the largest—provider of subrogation services in the United States. It recovered $237.3 million in health claims and had a backlog of over $1.1 billion of potentially recoverable claims during fiscal year 2000 alone. *See id.*

In light of the stakes involved, it is not surprising that six different circuits have been forced to squarely confront the Question Presented in recent years. It is also not surprising that federal district courts in every single circuit have confronted the Question Presented in published opinions.[18]

The frequent recurrence of this issue and its importance to plan fiduciaries and beneficiaries throughout the nation makes the conflict among the circuits untenable. This is particularly true given the fact that an essential policy underlying ERISA is the maintenance of national uniformity where benefits are concerned. *See Patterson v. Shumate*, 504 U.S. 753, 765 (1992) ("[O]ur holding furthers another important policy underlying ERISA: uniform national treatment of pension benefits."). Under the current legal regime, the scope of a plan fiduciary's reimbursement rights (and, conversely, a plan participant's reimbursement obligations) varies with the location in which the plan participant may be subject to personal jurisdiction. As long

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[18] In the First Circuit, *see e.g, Mank v. Green*, 323 F. Supp. 2d 115 (D. Me. 2004). In the Second Circuit, *see e.g., Primax Recoveries, Inc. v. Carey*, 247 F. Supp. 2d 337 (S.D.N.Y. 2002). In the Third Circuit, *see e.g., Asbestos Workers Local No. 42 Welfare Fund v. Brewster*, 227 F. Supp. 2d 226 (D. Del. 2002). In the Eighth Circuit, *see e.g., Givens v. Wal-Mart Stores, Inc., et al.*, 327 F. Supp. 2d 1057 (D. Neb. 2003); *Wellmark, Inc. v. Deguara*, 257 F. Supp. 2d 1209 (D. Iowa 2003); *Bauer v. Gylten*, 2002 U.S. Dist. LEXIS 7246 (D.N.D. 2002); *Hotel & Restaurant & Bar Employees Fringe Benefit Funds v. Trong*, 2002 U.S. Dist. LEXIS 1697 (D. Minn. 2002). In the Eleventh Circuit, *see e.g., BlueCross BlueShield of South Carolina v. Carillo*, 372 F. Supp. 2d 628 (N.D. Ga. 2005); *B.P. Amoco Corp. v. Connell*, 320 F. Supp. 2d 1368 (M.D. Ga. 2004); *Great-West Life & Annuity Ins. Co. v. Brown*, 192 F. Supp. 2d 1376, 1380-81 (M.D. Ga. 2002). In the D.C. Circuit, *see e.g., Primax Recoveries, Inc. v. Lee*, 260 F. Supp. 2d 43 (D.D.C. 2003).

as the circuits disagree, for example, plan fiduciaries may sue in federal court under Section 502(a)(3) to enforce their contractual reimbursement clauses against plan participants who are subject to personal jurisdiction in Maryland (within the Fourth Circuit) but not against plan participants who are only subject to personal jurisdiction in California (within the Ninth Circuit).

Finally, the current circuit conflict encourages plan fiduciaries to engage in nationwide forum shopping because plan participants may be subject to personal jurisdiction in multiple circuits with competing rules. This case is a perfect illustration. Although the Sereboffs were injured (and collected money from a third-party tortfeasor) in California, Mid Atlantic chose to sue the Sereboffs in Maryland federal court to avoid the unfavorable law of the Ninth Circuit.

The intervention of this Court is needed in order to resolve this conflict over an issue of manifest national importance.

III. The Decision Below Is In Conflict with This Court's Precedents.

Each of the courts of appeals and district courts to squarely confront the Question Presented has based its decision on the principles announced by this Court in *Knudson*.[19] Although the Question Presented in this Petition was left open by *Knudson*, the analytical approach mandated by the holding of *Knudson* was misapplied by the Fourth

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[19] *See* Pet. App. 3a ("The primary issue on appeal involves application of the Supreme Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson* . . ."); *see also Qualchoice*, 367 F.3d at 648 ("We therefore must determine ourselves how to answer that question, left open by *Knudson*.").

Circuit in this case as it has been misapplied by the other three courts of appeals that have adopted the "possession theory" exception.

Knudson teaches that to determine whether a claim by a plan fiduciary is, in fact, one for "appropriate equitable relief" under Section 502(a)(3) of ERISA, a court must determine whether or not the relief sought by the plan fiduciary would have traditionally been awarded by a court of equity. By properly applying this standard, the Sixth and Ninth Circuits have correctly rejected the "possession theory" exception to *Knudson*. *E.g.*, *Qualchoice*, 367 F.3d at 649

> We concluded, however, that the source of the claim asserted by [the plan fiduciary] is a contract to pay money and that the procedural mechanisms of constructive trust and equitable lien are not proper mechanisms for enforcing this right, *as such relief would not have traditionally been awarded by a court of equity in a breach of contract action.*

(Emphasis added).

On the other hand, the Fourth Circuit panel below—as well as the other three courts of appeal to have adopted the "possession theory" exception—failed to engage in a meaningful analysis regarding whether the relief sought by the plan fiduciary would have traditionally been awarded by a court of equity, as required by *Knudson*. Instead, these courts have based their holdings upon dicta in *Knudson* stating that "a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Knudson*, 534 U.S. at 213.

While this statement of dicta in *Knudson* is uncontroversial, it has been misapplied to the facts of the Question Presented by the group of circuits who apply the "possession theory" exception. The rule of these circuits misinterprets the concept of traceability *at equity*, which allowed litigants to recover monies or property belonging to them in good conscience, though it had changed forms (*e.g.*, from money to real property), provided it could be traced back *to the plaintiff* as the original source of the precise monies or property at issue.

When the facts of the Question Presented are involved, the monies at issue can be traced from their current location (*e.g.*, a particular bank account) back to the third-party tortfeasor—who paid the participant pursuant to the settlement or judgment of a personal injury lawsuit. These monies cannot, however, be traced from the tortfeasor back to the plan fiduciary. The tortfeasor may have paid the plan participant to compensate her (all or in part) for medical expenses. Those medical expenses, it is true, were already paid for with monies advanced by the plan. The funds paid by the tortfeasor, however, are different from those advanced by the plan because the latter has already been depleted to pay for the participant's legitimate medical care.

This crucial distinction, while a technical one, is dispositive in light of this Court's decisions in *Mertens* and *Knudson*. As far as traditional courts of equity were concerned, the funds are not "traceable" to the plan. The claims at issue are therefore legal. In the words of this Court in *Knudson*:

> Here, petitioners seek, in essence, to impose personal liability on respondents for a contractual obligation to pay money—relief that was not typically available

> in equity. "A claim for money due and owing under a contract is 'quintessentially an action at law.'" "Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." And 'money damages are, of course, the classic form of *legal* relief.

Knudson, 534 U.S at 210 (internal citations omitted).

In sum, the relief sought by plan fiduciaries cannot constitute "appropriate equitable relief" under Section 502(a)(3) and the decision below is, thus, in conflict with this Court's precedents.

IV. This Case Is An Ideal Vehicle to Address the Question Presented.

This case presents a textbook vehicle to resolve the circuit conflict. The relevant facts are uncontested because the parties stipulated to all facts. Pet. App. 6a, 36a-45a. The Question Presented is determinative of the parties' claims. Pet. App. 3a. Moreover, the circuit conflict is squarely presented. The claims involved are indistinguishable (and the facts are remarkably similar) to those in the cases decided by the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits. Put simply, the case arises in a context and in a procedural posture that could hardly be better suited to this Court's resolution of the exceptionally important jurisdictional Question Presented.

Furthermore, the interests of ERISA weigh heavily in favor of granting certiorari at this time. The circuit conflict over the Question Presented undermines a fundamental policy underlying the statute—national uniformity in the area of employee benefits. Despite this Court's grant of certiorari in *Knudson*, the circuit conflict over the Question Presented persists. This important and frequently recurring question merits review in this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED MAY 4, 2005

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 04-1336, 04-1403, 04-1722

December 2, 2004, Argued
May 4, 2005, Decided

MID ATLANTIC MEDICAL SERVICES, LLC,

Plaintiff-Appellee,

v.

JOEL SEREBOFF; MARLENE SEREBOFF,

Defendants-Appellants.

SECRETARY OF LABOR, Amicus Supporting Appellee.

MID ATLANTIC MEDICAL SERVICES, LLC,

Plaintiff-Appellant,

v.

JOEL SEREBOFF; MARLENE SEREBOFF,

Defendants-Appellees.

Appendix A

MID ATLANTIC MEDICAL SERVICES, LLC,

Plaintiff-Appellee,

v.

JOEL SEREBOFF; MARLENE SEREBOFF,

Defendants-Appellants.

JUDGES: Before WIDENER and KING, Circuit Judges, and Henry F. FLOYD, United States District Judge for the District of South Carolina, sitting by designation. Judge King wrote the opinion, in which Judge Widener and Judge Floyd joined.

OPINION BY: KING, Circuit Judge:

These appeals emanate from a civil action initiated in the District of Maryland under § 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"). After Mid Atlantic Medical Services, Inc. ("MAMSI"), an ERISA plan fiduciary, had paid nearly $75,000 for accident-related benefits to Joel and Marlene Sereboff (the "Sereboffs"), the Sereboffs recovered $750,000 from the offending tortfeasors in a personal injury action in California state court (the "California litigation"). When the Sereboffs failed to reimburse MAMSI for the medical benefits it had paid, MAMSI sued, asserting that, as plan beneficiaries, they had failed to comply with their subrogation obligations to reimburse it for benefits paid on their behalf. By Order of January 27, 2004, the district court awarded summary judgment to MAMSI, deeming the relief sought to be equitable in nature under § 502(a)(3) and requiring the Sereboffs to

reimburse MAMSI for the payments it had made (the "Reimbursement Award"). The court then reduced the Reimbursement Award to account for MAMSI's share of the expenses incurred by the Sereboffs in pursuing the California litigation (the "Deduction Ruling"). Thereafter, by Order of May 10, 2004, the court awarded MAMSI the fees and costs it had incurred in securing the Reimbursement Award (the "Attorney's Fee Ruling").

The Sereboffs have appealed the Reimbursement Award and the Attorney's Fee Ruling, and MAMSI has cross-appealed on the Deduction Ruling. The primary issue on appeal involves application of the Supreme Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002), and it is one on which our sister circuits are split: whether a plan fiduciary asserting a subrogation right to reimbursement from a plan beneficiary who has received payments from a third party, and who possesses that recovery in an identifiable fund, is seeking "equitable relief" under § 502(a)(3) of ERISA. We agree with the district court that MAMSI's claim for reimbursement seeks equitable relief under § 502(a)(3) and, as explained below, we affirm the Reimbursement Award and the Deduction Ruling. We vacate and remand, however, on the Attorney's Fee Ruling.

I.

MAMSI serves as fiduciary of an ERISA-covered employee welfare benefit plan, the MAMSI Life and Health Insurance PPO Plan (the "Plan"). The Sereboffs, who live in Owings Mills, Maryland, were beneficiaries of the Plan, participating through Mrs. Sereboff's employer, the Katzen Eye Group. On June 22,

2000, the Sereboffs were injured in an automobile accident in California, and the Plan paid their medical expenses in the sum of $74,869.37.[1] The Plan contains an "Acts of Third Parties" subrogation provision, which accords MAMSI, as Plan fiduciary, the "right to recover any payments" made to beneficiaries by third parties for costs associated with an injury resulting from the acts of "another person or party." Plan at 29 ("Acts of Third Parties" provision). Under the Plan, any recovery by MAMSI from such payments is subject to a deduction for "reasonable attorney fees and court costs" incurred by the beneficiaries in securing the third-party payments, "prorated to reflect that portion of the total recovery" reimbursed to MAMSI for the benefits it had paid. *Id.*

On August 11, 2000, the Sereboffs initiated the California litigation in the Superior Court of Santa Clara County. In late 2000 and early 2001, MAMSI informed the Sereboffs and their lawyer, in multiple writings, that it had paid medical benefits on behalf of the Sereboffs and that, pursuant to the Plan, MAMSI was entitled to reimbursement for those expenditures should the California litigation be successful. MAMSI requested that the Sereboffs and their attorney execute subrogation lien agreements acknowledging the Sereboffs' obligations under the Plan. MAMSI also offered the attorney, Mr. Stein, the opportunity to represent it in connection with its subrogation claim, on a contingency fee basis. Neither the Sereboffs nor Stein executed the proposed agreements, and Stein did not initially respond to MAMSI's offer that he represent MAMSI in its subrogation claim.

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1. In connection with the injuries suffered by Mrs. Sereboff, the Plan paid benefits of $73,778.26. In connection with Mr. Sereboff's injuries, the Plan paid benefits of $1,091.11.

Appendix A

On April 13, 2001, MAMSI made what it called a "formal demand" that the Sereboffs cooperate in connection with its subrogation efforts under the Plan. On April 24, 2001, Stein informed MAMSI that it was not entitled to reimbursement from the Sereboffs, because subrogation liens such as those being pursued by MAMSI are not recoverable under decisions of the Ninth Circuit.[2] On May 23, 2001, in responding to Stein, MAMSI reasserted its request that the subrogation lien agreements be executed. MAMSI contended that the Plan was a Maryland contract subject to the law of that State, and that California law was inapplicable.[3] On May 30, 2001, Stein advised MAMSI that it should retain California counsel to protect its subrogation rights in the California litigation, because he could not properly represent the interests of both the Sereboffs and MAMSI.

On January 23, 2003, the Sereboffs settled the California litigation for the sum of $750,000. Upon receipt of the settlement funds, however, they declined to recognize MAMSI's position on subrogation and reimburse it for the benefits it had paid on their behalf. Instead, Stein disbursed the funds to the Sereboffs

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2. In his April 24, 2001 letter to MAMSI, Stein relied on *Reynolds Metals Co. v. Ellis*, 202 F.3d 1246 (9th Cir.2000); *Cement Masons Health & Welfare Trust Fund v. Stone*, 197 F.3d 1003 (9th Cir.1999); and *FMC Medical Plan v. Owens*, 122 F.3d 1258 (9th Cir.1997), to support the proposition that MAMSI was not entitled to reimbursement from his clients.

3. In contrast to the assertion in MAMSI's May 23, 2001 letter that Maryland law governs the issues here, the parties, by their Joint Stipulation of Facts, have agreed that this proceeding is governed by the legal principles applicable under ERISA.

and his law firm, pursuant to their representation agreement in the California litigation. The Sereboffs then placed the funds into their investment accounts.

On August 5, 2003, MAMSI instituted this proceeding in the District of Maryland, pursuant to § 502(a)(3) of ERISA, which authorizes a civil action by an ERISA participant or fiduciary to enjoin any act which violates the terms of an ERISA plan, or to "obtain other appropriate equitable relief" to enforce the plan's provisions. 29 U.S.C. § 1132(a)(3). MAMSI thereby sought, *inter alia,* restitution of the funds held by the Sereboffs in their investment accounts. It also sought emergency relief in the district court, seeking to enjoin the Sereboffs and Stein from disposing of the settlement funds until MAMSI's claims for reimbursement could be resolved. On August 11, 2003, the Sereboffs agreed, by stipulation filed with the court, to "preserve $74,869.37 of the settlement funds" until it ruled on the merits of the dispute.[4]

On September 16, 2003, MAMSI moved for summary judgment against the Sereboffs, asserting that it was "entitled to recover the disputed proceeds under the terms of the Plan," and maintaining that it was seeking "equitable relief" authorized under § 502(a)(3) of ERISA. On September 25, 2003, the Sereboffs sought dismissal of the district court action, asserting that MAMSI was "seeking monetary damages which [were] not permissible" under ERISA. On January 27, 2004, the district court denied the Sereboffs' motion to dismiss. It granted in part MAMSI's motion for summary judgment, agreeing that MAMSI sought relief under § 502(a)(3) and that it was entitled to reimbursement of the $74,869.37, plus interest (the Reimbursement Award).

4. The August 11, 2003 stipulation is separate and distinct from the Joint Stipulation of Facts.

The court then reduced the Reimbursement Award to account for MAMSI's "prorated" share of the "reasonable attorney fees and court costs" incurred by the Sereboffs in pursuing the California litigation (the Deduction Ruling).

On February 9, 2004, MAMSI sought an award requiring the Sereboffs to pay the expenses it had incurred in securing the Reimbursement Award. On May 10, 2004, the district court granted that request, and it entered judgment for MAMSI in the sum of $19,044.75, plus interest (the Attorney's Fee Ruling). As noted, the Sereboffs have appealed the Reimbursement Award and the Attorney's Fee Ruling, and MAMSI has cross-appealed on the Deduction Ruling. We possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

We review de novo a district court's award of summary judgment, viewing the facts and inferences drawn therefrom in the light most favorable to the non-moving party. *Seabulk Offshore, Ltd. v. Am. Home Assurance Co.*, 377 F.3d 408, 418 (4th Cir.2004). In this proceeding, the Sereboffs' challenge to summary judgment on the Reimbursement Award and MAMSI's contention of error with regard to the Deduction Ruling present questions of law to be reviewed de novo. *See Johannssen v. Dist. No. 1—Pac. Coast Dist.*, 292 F.3d 159, 168 (4th Cir.2002). On the other hand, we review for abuse of discretion the Sereboffs' challenge to the Attorney's Fee Ruling. *See id.* at 178.

Appendix A

III.

Turning to the contentions of the parties, we first assess the primary issue raised here—the Sereboffs' challenge to the Reimbursement Award—which turns on whether MAMSI sought relief that is properly characterized as "other appropriate equitable relief" under § 502(a)(3) of ERISA. We then assess MAMSI's challenge to the Deduction Ruling and the Sereboffs' appeal of the Attorney's Fee Ruling.

A.

The Sereboffs first contend that the Reimbursement Award was erroneously made, asserting that the relief MAMSI sought was legal, rather than equitable, in nature. In determining whether the district court properly granted the Reimbursement Award, we first assess whether § 502(a)(3) authorizes MAMSI to seek restitution of the disputed funds held in the Sereboffs' investment accounts. Section 502(a)(3) is the civil enforcement mechanism available to ERISA fiduciaries seeking to recover benefits paid under an ERISA plan. 29 U.S.C. § 1132(a)(3). It authorizes the pursuit of a civil action by an ERISA fiduciary to enjoin any act which violates the terms of a plan, or to "obtain other appropriate *equitable* relief" to enforce a plan's provisions. Hyperlink *Id.* (emphasis added). In disputes where § 502(a)(3) does not expressly authorize relief, the federal courts are not empowered to award it. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) (emphasizing Court's "unwillingness to infer causes of action in the ERISA

context").[5] Thus, the availability of relief to MAMSI turns on the proper characterization of MAMSI's action, as lying in law or in equity.

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5. In asserting that the Reimbursement Award was erroneously made, the Sereboffs contend that the district court lacked "jurisdiction" to enter judgment in favor of MAMSI. Certain of the courts to have assessed the question presented by the Reimbursement Award have characterized the issue as whether they (the courts) possessed subject matter jurisdiction over the fiduciary's reimbursement action. *See infra* Part III.A.2 (citing *Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (6th Cir.2004); *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348 (5th Cir.2003); *Admin. Comm. of the Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Varco*, 338 F.3d 680 (7th Cir.2003)). We do not, however, view the Sereboffs' appeal of the Reimbursement Award as calling federal court jurisdiction into question. Section 1331 of Title 28 provides the federal courts with jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." A case arises under the laws of the United States within § 1331 only if it is apparent from the face of a well-pleaded complaint that the plaintiff's cause of action was created by federal law, "unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." *Taylor v. Anderson*, 234 U.S. 74, 75-76, 34 S.Ct. 724, 58 L.Ed. 1218 (1914). In this dispute, MAMSI's complaint seeks "equitable relief," and § 502(a)(3) of ERISA authorizes an action for "other appropriate equitable relief." As a result, the face of MAMSI's complaint reveals that its cause of action—for equitable relief under ERISA—was created by federal law. *See Westaff (USA) Inc. v. Arce*, 298 F.3d 1164, 1167 (9th Cir.2002) (concluding that when an ERISA plan fiduciary "brings a suit seeking non-equitable relief, dismissal is properly on the merits for failure to state a claim, rather than for lack of subject matter jurisdiction").

Appendix A

In assessing whether MAMSI's civil action seeks equitable or legal relief, we are guided (as was the district court) by the Supreme Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002). In *Knudson*, the Court explained that § 502(a)(3) does not authorize all types of relief that a court of equity might award; it only authorizes those remedies "'that were *typically* available in equity.'" 534 U.S. at 210, 122 S.Ct. 708 (quoting *Mertens*, 508 U.S. at 256, 113 S.Ct. 2063). In that dispute, Janette Knudson, an ERISA plan beneficiary, was injured in an automobile accident; she was advanced money by the plan to cover her medical expenses; and she then recovered for her injuries in a lawsuit against the tortfeasor. *Id.* at 207, 122 S.Ct. 708. The settlement funds received from the tortfeasor did not enter into Knudson's possession, however, but instead were placed in a Special Needs Trust to provide for her ongoing medical care. *Id.* at 207-08, 122 S.Ct. 708. The plan fiduciary then sought declaratory and injunctive relief to require Knudson and her husband, the plan participant, to reimburse the plan from the litigation proceeds she had received. *Id.* at 208, 122 S.Ct. 708.

The Court denied the relief sought by the fiduciary, concluding that it was not claiming "particular funds that, in good conscience, belong to [it]," *Knudson*, 534 U.S. at 214, 122 S.Ct. 708, but instead was seeking "to impose personal liability on [the Knudsons] for a contractual obligation to pay money—relief that was not typically available in equity," *id.* at 210, 122 S.Ct. 708. The Court explained that an ERISA plan fiduciary may seek equitable restitution in the form of an equitable lien where "money or property identified as belonging in good conscience to the [fiduciary] could clearly be traced to particular

funds or property in the [beneficiary's] possession." *Id.* at 213, 122 S.Ct. 708. By contrast, the Court reasoned that where the property sought to be recovered has been" 'dissipated so that no product remains,' the [fiduciary's] 'claim is only that of a general creditor.' " *Id.* (quoting Restatement of Restitution § 215 cmt. a, at 867 (1936)). In that circumstance, the fiduciary is seeking a legal remedy—the "imposition of personal liability" on the beneficiary to pay a sum of money owed to the plan— and its action falls outside the jurisdictional ambit of § 502(a)(3). *Id.* at 214, 122 S.Ct. 708.

1.

We agree with the district court that, in this dispute, MAMSI's action seeks equitable restitution, as that term is used in *Knudson,* because MAMSI seeks to recover funds that are specifically identifiable, belong in good conscience to MAMSI, and are within the possession and control of the Sereboffs. First, the funds have not been dissipated, and they are specifically identifiable. By the stipulation of August 11, 2003, between the Sereboffs and MAMSI, $74,869.37 of the settlement funds are preserved by the Sereboffs in their investment accounts. Although the funds have been placed in accounts with the Sereboffs' other monies, they can "clearly be traced to particular funds" recovered in the California litigation. *Knudson,* 534 U.S. at 213, 122 S.Ct. 708. Second, the disputed funds belong in good conscience to MAMSI. The Plan contains express, unambiguous reimbursement provisions, according MAMSI the "right to recover any payments" made to the Sereboffs by a third party. Third, the disputed funds are within the possession and control of the Sereboffs. They received those funds in the California litigation and held them in their investment accounts pending resolution of

this proceeding. In *Knudson,* by contrast, the funds received from the tortfeasor were placed in a Special Needs Trust, outside the possession or control of the beneficiary. Thus, the action pursued by MAMSI, and resulting in the Reimbursement Award, is equitable in nature under § 502(a)(3), and the court properly granted relief with respect to it.

2.

Recent decisions by the Fifth, Seventh, and Tenth Circuits support our determination that MAMSI's reimbursement proceeding lies in equity. Most recently, the Tenth Circuit, in *Administrative Committee of the Wal-Mart Associates Health & Welfare Plan v. Willard,* 393 F.3d 1119, 1122 (10th Cir.2004), concluded that a plan fiduciary may maintain an action for equitable relief if the plan is seeking to recover funds that are specifically identifiable, belong in good conscience to the fiduciary, and are within the possession and control of the beneficiary. In *Willard,* an ERISA fiduciary sought to enforce a subrogation clause against a beneficiary through imposition of a constructive trust on settlement funds received from a third party tortfeasor. *Id.* at 1120. The district court allowed the fiduciary to intervene and deposit a portion of the settlement proceeds equivalent to the medical expenses into the court registry. *Id.* at 1120-21. On appeal, the Tenth Circuit agreed that the fiduciary's effort to secure imposition of an equitable lien fell within the ambit of § 502(a)(3). *See id.* at 1125.[6]

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6. The Sereboffs correctly note that the intervention by the fiduciary in *Willard*—to deposit a portion of the settlement proceeds into the court registry—differs from the factual predicate underlying this dispute. Here, seven months elapsed between settlement of the

(Cont'd)

Appendix A

The Fifth and Seventh Circuits followed a similar approach for assessing whether an ERISA plan fiduciary may maintain an action for equitable relief. *See Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348 (5th Cir.2003); *Admin. Comm. of the Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Varco*, 338 F.3d 680 (7th Cir.2003). In both *Bombardier* and *Varco*, as in this proceeding, the beneficiaries' attorneys had accepted payment from the tortfeasors on behalf of their clients, and placed the funds into accounts over which the beneficiaries had constructive possession. In those proceedings, the courts held that the fiduciaries were seeking "equitable relief" under § 502(a)(3). Here, the elements of equitable restitution are satisfied, and the district court properly awarded reimbursement to MAMSI.[7]

(Cont'd)
California litigation and MAMSI's initiation of this proceeding seeking restitution of the funds held by the Sereboffs in their investment accounts. Regardless of any time lapse, however, as in *Willard*, the funds sought by the fiduciary were clearly traceable to particular funds in the possession of the beneficiaries.

7. We recognize that our ruling today appears to be at variance with recent decisions by the Sixth and Ninth Circuits. *See Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (6th Cir.2004); *Westaff (USA) Inc. v. Arce*, 298 F.3d 1164 (9th Cir.2002). In those decisions, the courts held that a plan fiduciary's assertion of a subrogation right to reimbursement from a plan beneficiary who has received payments from a third party is legal in nature, regardless of whether the beneficiary possesses that recovery in an identifiable fund. *See Qualchoice*, 367 F.3d at 650; *Westaff*, 298 F.3d at 1167. In *Westaff*, the Ninth Circuit acknowledged that the funds at issue—
(Cont'd)

Appendix A

B.

After making its Reimbursement Award to MAMSI, the district court reduced the Award to account for MAMSI's prorated share of the Sereboffs' attorney's fees and costs associated with the California litigation (the Deduction Ruling). MAMSI contends that the Deduction Ruling was erroneous, asserting that such a deduction is not appropriate where the plan is compelled to retain counsel to protect its reimbursement interests, and when the beneficiary fails to abide by the plan's provisions.

A primary purpose of ERISA is to "ensure the integrity of written, bargained-for benefit plans." *United McGill Corp. v. Stinnett,* 154 F.3d 168, 172 (4th Cir.1998). To achieve this objective, the "plain language of an ERISA plan must be enforced

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(Cont'd)

which were placed in an escrow account in the beneficiary's name pending a determination of their ownership—were "specifically identifiable." 298 F.3d at 1167. Nevertheless, the court held that the funds were a "legitimate personal injury settlement to which the beneficiary is entitled" and that the fiduciary's action was "one for money damages" falling outside the jurisdictional grant of § 502(a)(3). *Id.* Similarly, in *Qualchoice,* the Sixth Circuit concluded that a plan fiduciary's action for reimbursement was legal in nature, even though the beneficiary possessed the funds recovered from a third party in an identifiable fund. 367 F.3d at 649. We perceive, as did the Tenth Circuit in *Willard* and the Fifth Circuit in *Bombardier,* that the *Qualchoice* and *Westaff* decisions depart from the Court's decision in *Knudson,* and we decline to follow their more restrictive view of what constitutes "other appropriate equitable relief" under § 502(a)(3). *See Willard,* 393 F.3d at 1125; *Bombardier,* 354 F.3d at 358 n. 43.

in accordance with 'its literal and natural meaning.'" *Id.* (quoting *Health Cost Controls v. Isbell,* 139 F.3d 1070, 1072 (6th Cir.1997)). In this dispute, the provisions of the Plan mandate that any reimbursement to MAMSI of payments made to the Sereboffs by a third party is subject to a deduction for "reasonable attorney fees and court costs prorated to reflect that portion of the total recovery which is due [MAMSI] for benefits paid." Plan at 29.

Under the terms of the Plan, a prorated portion of the Sereboffs' attorney's fees and costs associated with the California litigation should be deducted from the Reimbursement Award. The Reimbursement Award grants reimbursement to MAMSI in the sum of $74,869.37, which represents the amount being held in the Sereboffs' investment accounts that the Plan paid for their medical expenses. As that sum is roughly ten percent of the $750,000 settlement agreement, the district court appropriately reduced the Reimbursement Award by that proportion of the Sereboffs' litigation expenses.

In contending otherwise, MAMSI relies on court decisions that did not involve agreements regarding the deduction of attorney's fees from reimbursement awards. *See Waller v. Hormel Foods Corp.,* 120 F.3d 138 (8th Cir.1997); *United States v. Tobias,* 935 F.2d 666 (4th Cir.1991). In fact, each of those decisions suggests that the inclusion of such a provision in the ERISA plan would have altered the ruling. *See Waller,* 120 F.3d at 141 (basing amount of deduction on value of plan beneficiary's legal service to plan because "the Plan's subrogation clause contains no provision regarding attorney's fees"); *Tobias,* 935 F.2d at 669 (observing that general rule against "common fund" reimbursement has exception for "express or implied

agreements" regarding attorney's fees). In these circumstances, we must affirm the Deduction Ruling.

C.

Finally, the Sereboffs challenge the Attorney's Fee Ruling made by the district court, in which MAMSI was awarded the attorney's fees and costs it had incurred in litigating the Reimbursement Award. Because ERISA authorizes a district court to exercise its discretion to award a "'reasonable attorney's fee and costs of action to either party,'" we review the Attorney's Fee Ruling for abuse of discretion. *Johannssen v. Dist. No. 1—Pac. Coast Dist.*, 292 F.3d 159, 178 (4th Cir.2002) (quoting 29 U.S.C. § 1132(g)(1)). In reviewing such discretionary rulings, we have adhered to the proposition that discretion has been abused if a court has failed adequately to consider "judicially recognized factors constraining its exercise" of discretion, or in relying on "erroneous factual or legal premises." *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir.1993). Because this principle was contravened, we are constrained to vacate and remand on the Attorney's Fee Ruling.

In making its Attorney's Fee Ruling, the district court was obliged, pursuant to our decision in *Johannssen*, to consider each of five factors:

> (1) the degree of the opposing party's culpability or bad faith;
>
> (2) the ability of the opposing party to satisfy an award of attorney's fees;

(3) whether an award of attorney's fees against the opposing party would deter other persons acting under similar circumstances;

(4) whether the party requesting attorney's fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and

(5) the relative merits of the parties' positions.

See Johannssen, 292 F.3d at 179. As we observed in *Johannssen*, it is essential, in "order to ensure an adequate basis for review," for the trial court to have addressed each factor. *Id.*

In making the Attorney's Fee Ruling, the district court addressed three of the five factors specified by *Johannssen*—the first, second, and fifth.[8] First, the court found that the Sereboffs (and Stein) had not acted in bad faith under the first *Johannssen* factor. This finding on the first factor was, of course, supportive of the Sereboffs' position in opposition to MAMSI's fee request. Next, the court concluded that, despite the Sereboffs' lack of bad faith, their position on the Reimbursement Award "swam against a heavy current of legal precedent," rendering their position under the fifth factor to be meritless. Although the court did not identify or explain the "heavy current" of precedent that the Sereboffs' position contravened, it was apparently referring to the decisions on which its Reimbursement Award had relied: *Knudson*, *Bombardier*, *Varco*, and our unpublished decision in

8. Although the court, in making its Attorney's Fee Ruling, observed that the second, fourth, and fifth of the *Johannssen* factors favor an award of fees, its ruling did not analyze the fourth factor.

Primax Recoveries, Inc. v. Young, 83 Fed.Appx. 523 (4th Cir.2003). In assessing the fifth *Johannssen* factor, however, the court failed to consider that the Ninth Circuit's decision in *Westaff* had created a circuit split on the question presented by the Reimbursement Award (a question that was not addressed by *Knudson*'s holding): whether a plan fiduciary asserting a subrogation right to reimbursement from a plan beneficiary who has received payments from a third party, and who possesses that recovery in an identifiable fund, is seeking "equitable relief" under § 502(a)(3) of ERISA.

Finally, the district court addressed the second *Johannssen* factor and determined that the Sereboffs would have sufficient funds available to satisfy an attorney's fee award to MAMSI. In so ruling, the court presumed that the Sereboffs' lawyer, Mr. Stein, would "credit the award [of attorney's fees and costs] against his contingent fee collected" in the underlying personal injury suit. It identified no record support, however, for the proposition that Stein would so act. In any event, the court concluded that the Sereboffs would be able to satisfy the Attorney's Fee Ruling from the $750,000 they recovered in the California litigation.

In sum, the district court's assessment of the *Johannssen* factors was incomplete. On one hand, the court's analysis of the second factor favored a fee award to MAMSI. On the other, its analysis of the first factor mitigated against any award at all, and the court did not assess either the third or the fourth factor. Finally, the court's examination of the fifth factor failed to recognize the existing circuit split on the issue raised by the Reimbursement Award. As a result, the court erred in making the Attorney's Fee Ruling, and we are constrained to vacate the Ruling and remand for a further assessment under *Johannssen*.

Appendix A

IV.

Pursuant to the foregoing, we affirm the Reimbursement Award and the Deduction Ruling, and we vacate and remand on the Attorney's Fee Ruling.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND FILED MAY 10, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. AMD 03-2269

MID ATLANTIC MEDICAL SERVICES, INC.,

Plaintiff

v.

JOEL SEREBOFF AND MARLENE SEREBOFF,

Defendants

MEMORANDUM OPINION

DAVIS, District Judge.

In my Memorandum Opinion in this case filed on January 26, 2004, familiarity with which is assumed, *see Mid Atlantic Medical Services, Inc. v. Sereboff*, 303 F.Supp.2d 691 (D.Md.2004), I concluded that plaintiff, an ERISA-covered health insurance plan, was entitled to recover from defendants, participants in the plan, out of the proceeds of payments to defendants based on tort claims defendants asserted against those responsible for their injuries, reimbursement for health care benefits provided to them in consequence of a motor vehicle accident. The parties filed cross-appeals from my order.

Thereafter, in accordance with my order, plaintiff filed a timely application for attorney's fees and costs. *Cf. Johannssen v. District No. 1-Pacific Coast District, MEBA Pension Plan,* 292 F.3d 159, 178-79 (4th Cir.2002) (elucidating standards for attorney's fees awards under ERISA). Defendants oppose the plaintiff's application for fees and costs. No hearing is needed.

Defendants' opposition is quite narrow. They do not dispute the reasonableness of the claimed fees and expenses. Rather, recognizing the broad discretion which informs a court's determination of an application for attorney's fees under ERISA, *id.*, they urge me to exercise my discretion to deny the application. I have considered the relevant Fourth Circuit guidelines, and I am persuaded that an award of fees is warranted here.* While defendants have certainly not acted in bad faith, and indeed, have apparently followed their attorney's advice in their insistence on litigating plaintiff's entitlement to reimbursement, as my prior order shows, I am convinced that defendant's counsel unwisely swam against a heavy current of legal precedent and that part of

* The non-exclusive factors are the following: "(1) degree of opposing parties' culpability or bad faith; (2) ability of opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions." *See Johannssen,* 292 F.3d at 179. In this case, an additional factor favoring an award of fees is the fact that my prior order required the plaintiff health plan to pay (in accordance with the terms of the plan) a *pro rata* share of the litigation costs in respect to the sums recovered by defendants here in the underlying tort action. *See* 303 F.Supp.2d at 696.

the cost of doing so justifiably includes a shifting of plaintiff's modest fees. Defendants are bound by their attorney's acts in this regard. (Indeed, I am willing to presume that, under the circumstances, counsel will credit the award made here against his contingent fee collected in respect to the underlying tort case, although the award here would be made even if that were not true. This would be especially appropriate inasmuch as counsel apparently regularly represents tort plaintiffs and the issue of reimbursement arises in his practice on a regular basis. If the Fourth Circuit agrees with counsel's interpretation of the law rather than with mine, then obviously the award of fees will not stand.). Clearly, in any event, defendants' substantial tort recovery will permit them to pay the fees and costs. In sum, I find that three of the guideline factors (factors (2), (4) and (5)) favor an award of fees, and two of them (factors (2) and (5)) decidedly so. Accordingly, the application for attorney's fees and costs shall be granted.

Filed: May 10, 2004

/s/
ANDRE M. DAVIS
UNITED STATES DISTRICT JUDGE

Appendix B

ORDER

In accordance with the foregoing Memorandum Opinion, it is this 10th day of May, 2004, by the United States District Court for the District of Maryland, ORDERED

(1) That the plaintiff's motion for attorney's fees, expenses and prejudgment interest is GRANTED; and it is further ORDERED

(2) That JUDGMENT IS HEREBY ENTERED IN FAVOR OF PLAINTIFF AGAINST DEFENDANTS JOINTLY AND SEVERALLY IN THE AMOUNT OF NINETEEN THOUSAND, FORTY-FOUR DOLLARS AND 75/100 ($19,044.75) TOGETHER WITH INTEREST AT THE LEGAL RATE OF SIX PERCENT PER ANNUM DATING FROM MARCH 13, 2004, THROUGH THE DATE OF THIS JUDGMENT; and it is further ORDERED

(3) That any and all prior rulings made by this Court disposing of any claims against any parties are incorporated by reference herein and this order shall be deemed to be a final judgment within the meaning of Fed.R.Civ.P. 58.

/s/
ANDRE M. DAVIS
United States District Judge

APPENDIX C — OPINION AND DECLARATORY JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DECIDED JANUARY 26, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. AMD 03-2269

January 26, 2004, Decided

MID ATLANTIC MEDICAL SERVICES INC.,

Plaintiff

v.

JOEL SEREBOFF and MARLENE SEREBOFF,

Defendants

MEMORANDUM OPINION

DAVIS, District Judge.

Defendants Joel and Marlene Sereboff, residents of Maryland, were injured in a motor vehicle accident while visiting California. In consequence of their injuries, the ERISA-covered health insurance plan of which they were participants through Mrs. Sereboff's employer provided benefits in the amount of $74,869.37. In due course, the Sereboffs successfully prosecuted a civil action in California state court against the parties responsible for their injuries. Ultimately, they settled their claims

for $750,000. Thereafter, upon the refusal by the Sereboffs to pay over a portion of their recovery to the health insurance plan in reimbursement for the benefits that had been provided, plaintiff Mid Atlantic Medical Services, Inc., the plan fiduciary, instituted this action against them pursuant to § 502(a)(3) the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(3).* Now pending are (1) the motion to dismiss for failure to state a claim filed by defendants and (2) the motion for summary judgment filed by plaintiff. The issues have been fully briefed and no hearing is necessary. For the reasons stated below, the motion to dismiss shall be denied and the motion for summary judgment shall be granted in part and denied in part.

I.

The applicable standard for the review of a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6) is well settled:

> A Rule 12(b)(6) motion should only be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true, it appears certain that the plaintiff cannot prove any set of facts in support

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* Plaintiff's verified complaint joined the Sereboffs' California attorney and his law firm (who were named in a separate count for interference with contractual relations) as well as the Sereboffs themselves (and indeed, plaintiff sought a temporary restraining order) because there was uncertainty as to how the settlement proceeds might be handled and the timing of any disbursements. Defendants other than the Sereboffs have been dismissed and the sole claim pending at this time is plaintiff's claim for reimbursement under ERISA.

> of his claim entitling him to relief. *See Edwards v. City of Goldsboro,* 178 F.3d 231, 244 (4th Cir.1999). Furthermore, the "Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim." *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Rather, Rule 8(a)(2) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2).

Migdal v. Rowe Price-Fleming Int'l, Inc., 248 F.3d 321, 325-26 (4th Cir.2001).

Pursuant to Fed.R.Civ.P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is material for purposes of summary judgment, if when applied to the substantive law, it affects the outcome of the litigation. *Id.* at 248, 106 S.Ct. 2505. Summary judgment is also appropriate when a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

A party opposing a properly supported motion for summary judgment bears the burden of establishing the existence of a genuine issue of material fact. *Anderson,* 477 U.S. at 248-49, 106 S.Ct. 2505. "When a motion for summary judgment is made

and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavit or as otherwise provided in [Rule 56] must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). *See Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. 2548; *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505; *Shealy v. Winston*, 929 F.2d 1009, 1012 (4th Cir.1991). Of course, the facts, as well as the justifiable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. *See Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The court, however, has an affirmative obligation to prevent factually unsupported claims and defenses from proceeding to trial. *See Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir.1987).

II.

Helpfully, the parties have entered into a comprehensive stipulation of undisputed facts which, without the exhibits thereto, is attached to this Memorandum Opinion and is incorporated by reference herein.

At bottom, the dispute between the parties is narrow and highly focused, and may be set forth succinctly. In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213-14, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002), the Supreme Court affirmed a judgment of the Ninth Circuit that an ERISA fiduciary could not recover reimbursement in federal court against a beneficiary (who, like the Sereboffs, had suffered injuries in a motor vehicle accident) under ERISA § 502(a)(3) because the

relief the fiduciary sought was not "other appropriate equitable relief" within the contemplation of § 502(a)(3). The Court held on the facts presented that the ostensible claim for "restitution" sought by the ERISA fiduciary was actually a claim for compensatory damages relief. *See id.* at 213, 122 S.Ct. 708 ("[N]ot all relief falling under the rubric of restitution is available in equity.").

In announcing its holding, *Knudson* provided some critical *obiter dicta* in delineating the circumstances under which an ERISA fiduciary's claim falls on the "equity" or "law" side of the often fuzzy line separating the two forms of monetary relief encompassed by the term restitution:

> In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity. See, *e.g.*, 1 Dobbs §§ 1.2, at 11; *id.*, §§ 4.1(1), at 556; *id.*, §§ 4.1(3), at 564-565; *id.*, §§§§ 4.2-4.3, at 570-624; 5 Corbin §§ 1102, at 550; Muir, ERISA Remedies: Chimera or Congressional Compromise?, 81 Iowa L.Rev. 1, 36-37 (1995); Redish, Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making, 70 Nw. U.L.Rev. 486, 528 (1975). Thus, "restitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case," and whether it is legal or equitable depends on "the basis for [the plaintiff's] claim" and the nature of the underlying remedies sought. *Reich v. Continental Casualty Co.*, 33 F.3d 754, 756 (C.A.7 1994) (Posner, J.).

Appendix C

In cases in which the plaintiff "could *not* assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him," the plaintiff had a right to restitution *at law* through an action derived from the common-law writ of assumpsit. 1 Dobbs §§ 4.2(1), at 571. See also Muir, *supra,* at 37. In such cases, the plaintiff's claim was considered legal because he sought "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." Restatement of Restitution §§ 160, Comment *a,* pp. 641-642 (1936). Such claims were viewed essentially as actions at law for breach of contract (whether the contract was actual or implied).

In contrast, a plaintiff could seek restitution *in equity,* ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. See 1 Dobbs §§ 4.3(1), at 587-588; Restatement of Restitution, *supra,* §§ 160, Comment *a,* at 641-642; 1 G. Palmer, Law of Restitution §§ 1.4, p. 17; §§ 3.7, p. 262 (1978). A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where "the property [sought to be recovered] or its proceeds

> have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor," and the plaintiff "cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant]." Restatement of Restitution, *supra*, §§ 215, Comment *a*, at 867. Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

Id. at 213-15.

Virtually every federal court that has been called upon to apply the Supreme Court's decision in *Knudson* has recognized the import of the Court's *dicta* and has held that where funds in the actual or constructive possession of a plan beneficiary are traceable to "money or property identified as belonging in good conscience to [the ERISA plan]," *id.* at 214, 122 S.Ct. 708, the ERISA fiduciary may bring its claim for reimbursement in federal court under § 502(a)(3), as a claim for "other appropriate equitable relief." *See, e.g., Primax Recoveries, Inc. v. Young*, 83 Fed.Appx. 523, 2003 WL 22973630 (4th Cir.2003) (citing with approval *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439, 445 (5th Cir.2002)); *Bombardier Aerospace Employee Welfare Benefits Plan*, 354 F.3d 348, 356 (5th Cir.2003) (formulating the following three-part test for cognizable actions under § 503(a)(3): "Does the Plan seek to recover funds (1) that are specifically identifiable, (2) that belong in good conscience to the Plan, and (3) that are within the possession and control of the defendant beneficiary?"). Against the weight of authority on these issues, it appears, as the Sereboffs note, the Ninth Circuit

seems to have ignored the Supreme Court's *dicta,* as it continues to declare, even after *Knudson,* and seemingly without qualification, that reimbursement claims by ERISA fiduciaries are legal claims for compensatory damages seeking to impose personal liability. *See Westaff (USA) v. Arce,* 298 F.3d 1164, 1167 (9th Cir.2002) (reasoning that even though funds recovered by the insured are in the insured's possession (escrow account) and identifiable, an action to determine the rights of the insurer under the plan's subrogation clause is a request for legal relief and not authorized by § 502(a)(3)), *cert. denied,* 537 U.S. 1111, 123 S.Ct. 901, 154 L.Ed.2d 784 (2003). The Sereboffs invite me to apply the Ninth Circuit's approach in this case, either because it is a sounder approach as a matter of policy or because the accident out of which plaintiff's claim arises occurred in that circuit. I decline this invitation and adhere to the approach followed by the courts that have given precedential effect to the Supreme Court's *dicta* in *Knudson.*

Manifestly, in the case at bar, plaintiff (an ERISA fiduciary) seeks to recover funds that (1) are "specifically identifiable" (because they were paid to the Sereboffs and their attorney on behalf of the tortfeasors causing their injuries, and the specific portion claimed by plaintiff has been separated from the balance of those funds); (2) "belong in good conscience to the Plan" (because the plain language of the plan indisputably requires reimbursement under the circumstances of the Sereboffs' tort claims arising out of the California accident); and (3) "are within the possession and control of the defendant beneficiary" (because the Sereboffs and their attorney received the funds in hand and the Sereboffs have segregated the claimed monies in an investment account to abide the result of this lawsuit). Accordingly, defendants' motion to dismiss shall be denied because the verified

complaint adequately puts defendants on notice of the nature and character of plaintiff's claim and indeed, plainly states a claim under ERISA as elucidated in *Knudson*. Furthermore, defendants having failed to generate a genuine dispute of material fact as to any element of plaintiff's claim, and because plaintiff is entitled to judgment as a matter of law, plaintiff's motion for summary judgment shall be granted, but only in part.

Plaintiff's motion for summary judgment shall be granted only *in part* because I am constrained to reject plaintiff's attempt to avoid a *deduction* from its claimed amount for reimbursement to account for its *pro rata* share of (the Sereboffs') attorney's fees and costs that were incurred to achieve success in prosecuting their state court damages action. It is undisputed that such a deduction is provided for under the plain terms of the plan. Plaintiff contends that because the Sereboffs (admittedly on the advice of their California counsel, who understandably is enamored of the Ninth Circuit approach to reimbursement claims by ERISA fiduciaries), have disputed plaintiff's entitlement to reimbursement, required that plaintiff file this case. This is scant reason to ignore the plain terms of the plan and I decline to do so. On the other hand, ERISA provides that a "'court in its discretion may allow a reasonable attorney's fee and costs of action to either party.' 29 U.S.C. §§ 1132(g)(1)." *Johannssen v. District No. 1-Pacific Coast District, MEBA Pension Plan,* 292 F.3d 159, 168-69 (4th Cir.2002). Thus, plaintiff is free to file an application for attorney's fees pursuant to ERISA in accordance with Local Rule 109.2. *See also* Fed. R. Civ. P. 54(d)(2)(A), (B).

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III.

For the reasons set forth, the motion to dismiss shall be denied and the motion for summary judgment shall be granted in part and denied in part. An order follows. If plaintiff files a motion for attorney's fees as the prevailing party in this action, briefing on such motion shall proceed in the normal course.

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DECLARATORY JUDGMENT and ORDER

In accordance with the foregoing Memorandum Opinion, it is this 26th day of January, 2004, by the United States District Court for the District of Maryland, ORDERED, ADJUDGED, and DECREED

(1) That the defendants' motion to dismiss is DENIED; and it is further ORDERED

(2) That the plaintiff's motion for summary judgment is GRANTED IN PART AND DENIED IN PART; and it is further ORDERED

(3) That ON OR BEFORE FEBRUARY 9, 2004, DEFENDANTS JOEL SEREBOFF and MARLENE SEREBOFF SHALL PAY OVER TO PLAINTIFF OR ITS DESIGNEE THE PRINCIPAL SUM OF $74,869.37, TOGETHER WITH INTEREST AT THE LEGAL RATE OF SIX PERCENT PER ANNUM DATING FROM MARCH 12, 2003, PROVIDED THAT SUCH PAYMENT SHALL BE REDUCED BY THE AMOUNT CALCULATED PURSUANT TO PARAGRAPH (4) BELOW; and it is further ORDERED

(4) That IN ACCORDANCE WITH THE TERMS OF THE MAMSI LIFE AND HEALTH INSURANCE PPO, THE AMOUNT PAYABLE BY DEFENDANTS TO PLAINTIFF SHALL BE REDUCED BY PLAINTIFF'S *PRO RATA* SHARE OF "REASONABLE ATTORNEY FEES AND COURT COSTS," THE TOTAL AMOUNT OF WHICH THE COURT FINDS AS A MATTER OF LAW TO BE

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(a) $26,123.15 (COSTS AND LITIGATION EXPENSES) and

(b) A REASONABLE ATTORNEY FEE OF TWENTY-FIVE PERCENT (25%) OF THE TOTAL RECOVERY ($750,000) PAID TO AND ON BEHALF OF JOEL SEREBOFF and MARLENE SEREBOFF IN RESPECT OF THEIR INJURIES AND LOSSES IN THE UNDERLYING STATE COURT CLAIM; and it is further ORDERED

(5) That THIS ORDER IS ENTERED WITHOUT PREJUDICE TO PLAINTIFF'S RIGHT TO SEEK AN AWARD OF ATTORNEY'S FEES AND COSTS AS PREVAILING PARTY IN THIS ACTION; and it is further ORDERED

(6) Any and all prior rulings made by this Court disposing of any claims against any parties are incorporated by reference herein and this order shall be deemed to be a final judgment within the meaning of Fed.R.Civ.P. 58.

/s/
ANDRE M. DAVIS
United States District Judge

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ATTACHMENT TO COURT'S OPINION

JOINT STIPULATION OF FACTS

1. Mid Atlantic Medical Services, Inc. ("MAMSI") is a fiduciary of the MAMSI Life and Health Insurance PPO Plan (the "Plan"), which is sponsored by Katzen Eye Group.

2. Defendant, Dr. Joel Sereboff, is a licensed psychologist residing in Owings Mills, Maryland and has been a practicing psychologist for 30 years.

3. Defendant, Marlene Sereboff, resides in Owings Mills, Maryland and is a registered nurse. She has worked at Katzen Eye Group for 20 years as a nurse and has been married to Dr. Joel Sereboff for 30 years.

4. On June 22, 2000, Joel and Marlene Sereboff were visiting California and were in the process of returning a vehicle to the Hertz-Rent-A-Car lot at San Jose International Airport when they were struck by a vehicle driven by Mr. Roederer, an employee of Lancaster Colony Corporation, in the course and scope of his employment.

5. The minor collision between the two vehicles caused the Sereboff's vehicle to be pushed into a K-Rail (a New Jersey turnpike barrier) with an exposed blunt concrete end. The design of this rental car facility greatly aggravated Sereboffs' injuries.

6. The owner of the property, City of San Jose, entered into a lease with a consortium of rental car companies who represented the entire spectrum of the rental car industry in

America. The consortium retained an architect to design the rental facility. All of these defendants were joined in the litigation. The initial Complaint was filed on August 11, 2000 and was amended to include the City of San Jose, the architect, the builders, and the rental car consortium.

7. After the events of the September 11, 2001 attack, a number of these rental car companies (Budget, National, Alamo) went into bankruptcy and the litigation was stayed on three occasions to exclude them from further participation in the litigation, but allowing the Sereboffs to go forward against the remaining defendants.

8. Joel Sereboff and Marlene Sereboff, for all times relevant to this action, were members of the Plan for the purposes of obtaining medical, surgical and hospital benefits.

9. The Plan is covered by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et. seq.* The Plan is a self-funded employee welfare benefit plan within the meaning of 29 U.S.C. § 1002(1).

10. In connection with the injuries suffered by Defendant Marlene Sereboff, the Plan paid medical benefits on her behalf in the amount of $73,778.26. In connection with the injuries suffered by Defendant Joel Sereboff, the Plan paid medical benefits on his behalf in the amount of $1,091.11.

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11. The Plan contains an acts of third parties provision, which states:

ACTS OF THIRD PARTIES

This subrogation provision applies when you are sick or injured as a result of the act or omission of another person or party. Subrogation means the Company's right to recover any payments made to you or your dependent by a third party or any insurer acting in place of, or on behalf of a third party or a third party's insurer, because of an injury or illness caused by a third party. Third party means another person or organization.

If you or your dependent receives benefits and have a right to recover damages from a third party, the Company is subrogated to this right. All recoveries from a third party (whether by lawsuit, settlement, or otherwise) must be used to reimburse the Company net of reasonable attorney fees and court costs prorated to reflect that portion of the total recovery which is due the Company for benefits paid. Any remainder will be yours or your dependents. The Company's share of the recovery will not be reduced because you or your dependent has not received the full damages claimed, unless the Company agrees in writing to a reduction.

You must promptly advise the Company whenever a claim is made against a third party with respect to any loss for which the Company benefits have been

> or will be paid. You or your dependent must execute any assignments, liens or other documents and provide information as the Company requests. MLH's benefits may be withheld until documents or information are received. If you need more information about subrogation, the Company will provide you with its subrogation procedures.

A true and correct copy of the Plan provision is attached hereto as Exhibit 1.

12. On August 11, 2000, John Stein ("Stein"), the Sereboff's attorney, filed a personal injury action in the Santa Clara County Superior Court on behalf of the Sereboffs in an action styled *Joel Sereboff and Marlene Sereboff v. Lancaster Colony Corporation, a corporation, Budget Rent-A-Car Corporation, a corporation, Team Fleet Financing Corporation, a corporation, Charles E. Roederer and Does 1 to 50,* case number CV791810. A true and correct copy of the referenced complaint is attached hereto as Exhibit 2.

13. In a separate correspondence dated October 18, 2000, from MAMSI to Stein, one letter regarding Marlene Sereboff and the other letter regarding Joel Sereboff, MAMSI informed Stein that it had reimbursement interest in proceeds the Sereboffs may recover relating to their injuries pursuant to the Evidence of Coverage and offered Stein an opportunity to assert MAMSI's subrogation lien. A true and correct copy of the October 18, 2000, correspondence is attached hereto as collective Exhibit 3.

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14. In correspondence dated October 18, 2000, from MAMSI to Marlene Sereboff, MAMSI informed her that it had paid $67,670.65 in medical claims on behalf of her and that, pursuant to the Evidence of Coverage, MAMSI has a right to reimbursement and, as such, requested that she sign an agreement acknowledging that she will abide by the terms within the Evidence of Coverage. Marlene Sereboff did not sign and return the agreement to MAMSI. A true and correct copy of the October 18, 2000, correspondence is attached hereto as Exhibit 4.

15. In correspondence dated October 18, 2000, from MAMSI to Marlene Sereboff regarding Joel Sereboff, MAMSI informed her that it had paid $5,797.60 in medical claims on behalf of Joel and that, pursuant to the Evidence of Coverage, MAMSI has reimbursement rights and, as such, requested that he sign an agreement acknowledging that she will abide by the terms within the Evidence of Coverage. (Marlene Sereboff did not sign and return the agreement to MAMSI). A true and correct copy of the October 18, 2000, correspondence is attached hereto as Exhibit 5.

16. In correspondence dated December 6, 2000, from MAMSI to Stein, MAMSI again gave Stein notice of its subrogation lien for medical expenses paid on behalf of Marlene Sereboff and again offered Stein an opportunity to assert MAMSI's subrogation lien. A true and correct copy of the December 6, 2000, correspondence is attached hereto as Exhibit 6.

17. In correspondence dated December 6, 2000, from MAMSI to Stein, MAMSI gave Stein notice that its subrogation lien had increased to $70,180.46. A true and correct copy of

the December 6, 2000, correspondence is attached hereto as Exhibit 7.

18. In correspondence dated December 6, 2000, from MAMSI to Marlene Sereboff, MAMSI informed her that she must reimburse the Plan upon recovery in relation to her injuries and requested that she sign an agreement acknowledging her obligation to reimburse MAMSI. A true and correct copy of the December 6, 2000, correspondence is attached hereto as Exhibit 8.

19. In correspondence dated December 6, 2000, sent via facsimile from MAMSI to Stein, MAMSI requested that Stein sign a lien agreement. Stein did not sign and return the lien agreement to MAMSI. A true and correct copy of the December 6, 2000, correspondence is attached hereto as Exhibit 9.

20. In correspondence dated April 13, 2001, from MAMSI to Stein regarding Marlene Sereboff, MAMSI informed Stein that the current amount of its lien was $72,317.35. A true and correct copy of the April 13, 2001, correspondence is attached hereto as Exhibit 10.

21. In separate correspondence dated April 13, 2001, from MAMSI to Stein and Marlene Sereboff, MAMSI made a formal demand requesting that Marlene Sereboff cooperate with MAMSI to enforce its rights under the Evidence of Coverage and sign a lien acknowledgement form. A true and correct copy of the April 13, 2001, correspondence is attached hereto as Exhibit 11.

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22. In correspondence dated April 24, 2001, from Stein to MAMSI, Stein informed MAMSI that he did not believe that it was entitled to reimbursement, citing four Ninth Circuit Court opinions holding that subrogation liens are not collectable. A true and correct copy of the April 24, 2001, correspondence is attached hereto as Exhibit 12.

23. In correspondence dated May 7,2001, from MAMSI to Stein, MAMSI gave notice of its reimbursement right and subrogation lien for medical claims paid on behalf of Joel Sereboff and offered Stein an opportunity to assert MAMSI's subrogation lien. A true and correct copy of the May 7, 2001, correspondence is attached hereto as Exhibit 13.

24. In correspondence dated May 7, 2001, from MAMSI to Stein, MAMSI requested that Stein complete and return an accident information form. A true and correct copy of the May 7, 2001, correspondence is attached hereto as Exhibit 14.

25. In correspondence dated May 7, 2001 from MAMSI to Marlene Sereboff, MAMSI informed her that she must reimburse MAMSI upon recovery from the parties responsible for Joel Sereboff's injuries and again requested that she sign and return an agreement acknowledging her obligation to reimburse MAMSI. A true and correct copy of the May 7, 2001, correspondence is attached hereto as Exhibit 15.

26. In correspondence dated May 23, 2001, MAMSI responded to Stein's April 24, 2001, correspondence. MAMSI denied it was an ERISA Plan and reasserted MAMSI's request for a signed lien agreement. MAMSI asserted that the Health Plan was a Maryland contract and that California law did not

apply. A true and correct copy of the May 23, 2001, correspondence is attached hereto as Exhibit 16.

27. In correspondence dated May 30, 2001, from Stein to MAMSI, Stein advised MAMSI to retain a California attorney to protect MAMSI's reimbursement interest in the litigation pending in California because he did not believe he could represent both interests. Stein told MAMSI they should negotiate separately for reimbursement of all monies owned MAMSI. A true and correct copy of the May 30, 2001, correspondence is attached hereto as Exhibit 17.

28. In correspondence dated June 7, 2001, from Stein to MAMSI, Stein enclosed a copy of the state court complaint he filed on behalf of the Sereboffs. A true and correct copy of the June 7, 2001, correspondence is attached hereto as Exhibit 18.

29. In correspondence dated June 28, 2001 from Stein to MAMSI, Stein informed MAMSI that his position regarding its reimbursement and lien claims against proceeds recovered by Joel Sereboff was the same as his position with regard to MAMSI's reimbursement and lien claims against proceeds recovered by Marlene Sereboff. A true and correct copy of the June 28, 2001, correspondence is attached hereto as Exhibit 19.

30. In correspondence dated October 17, 2001, and December 17, 2001, from MAMSI to Stein, MAMSI informed Stein that its lien was $72,929.86 for the medical claims paid on behalf of Marlene Sereboff and requested that Stein remit a check to MAMSI in the amount of the lien at the time the Sereboffs settled their pending personal injury action. A true and correct

copy of the October 17, 2001, and December 17, 2001, correspondence is attached hereto as collective Exhibit 20.

31. In correspondence dated February 22, 2002, from MAMSI to Stein regarding Joel Sereboff, MAMSI informed Stein that the current subrogation lien amount was $1,091.11. A true and correct copy of the February 22, 2002, correspondence is attached hereto as Exhibit 21.

32. In correspondence dated April 25, 2002, June 25, 2002, August 22, 2002, and March 12, 2003, from MAMSI to Stein regarding Marlene Sereboff, MAMSI informed Stein that its subrogation lien was $73,778.26 and requested that Stein reimburse MAMSI in the amount of the lien at the time of settlement. A true and correct copy of the April 25, 2002, June 25, 2002, August 22, 2002, and March 12, 2003, correspondence is attached hereto as collective Exhibit 22.

33. In correspondence dated May 24, 2002, August 22, 2002, and March 12, 2003, from MAMSI to Stein regarding Joel Sereboff, MAMSI informed Stein that the amount of its lien was $1,091.11 and requested that Stein make a check payable to MAMSI in the amount of the lien upon the case settling. A true and correct copy of the May 24, 2002, August 22, 2002, and March 12, 2003, correspondence is attached hereto as collective Exhibit 23.

34. On January 23, 2003, the case settled as to all parties in favor of the Sereboffs' claims. All defendants paid $750,000. Notice to the Court is attached hereto as Exhibit 27.

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35. In correspondence dated March 12, 2003, from MAMSI to Joel Sereboff, MAMSI informed Joel Sereboff that the amount of MAMSI's lien was $1,091.11 and requested that he issue a check to MAMSI in the amount of its lien upon the case settling. A true and correct copy of the March 12, 2003, correspondence is attached hereto as Exhibit 24.

36. In correspondence dated March 12, 2003, from MAMSI to Marlene Sereboff, MAMSI informed her that the amount of MAMSI's lien was $73,778.26 and requested that she issue a check to MAMSI in the amount of its lien upon the case settling. A true and correct copy of the March 12, 2003, correspondence is attached hereto as Exhibit 25.

37. The Sereboffs did not reimburse MAMSI in the amount of its lien following their settlement or notify MAMSI of their settlement.

38. In correspondence dated March 20, 2003, from Stein to MAMSI, replying to MAMSI's March 12, 2003 correspondence, Stein reiterated his opinion that the liens were not collectable, citing *Great-West Life & Annuity Insurance Company v. Janette Knudson* and *Westaff (USA) Inc. v. Betty Arce*. A true and correct copy of the March 20, 2003, correspondence is attached hereto as Exhibit 26.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC* FILED JUNE 1, 2005

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 04-1336
CA-03-2269-AMD-1

MID ATLANTIC MEDICAL SERVICES, LLC

Plaintiff - Appellee

v.

JOEL SEREBOFF; MARLENE SEREBOFF

Defendants - Appellants

No. 04-1403
CA-03-2269-AMD-1

SECRETARY OF LABOR

Amicus Supporting Appellee

MID ATLANTIC MEDICAL SERVICES, LLC

Plaintiff - Appellant

v.

JOEL SEREBOFF; MARLENE SEREBOFF

Defendants - Appellees

Appendix D

No. 04-1722
CA-03-2269-AMD-1

MID ATLANTIC MEDICAL SERVICES, LLC

Plaintiff - Appellee

v.

JOEL SEREBOFF; MARLENE SEREBOFF

Defendants - Appellants

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Widener, Judge King, and Judge Floyd.

For the Court,

/s/ Patricia S. Connor
CLERK

OCT 27 2005

No. 05-260

IN THE

Supreme Court of the United States

JOEL SEREBOFF and MARLENE SEREBOFF,
Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Mid Atlantic Medical Services, Inc., the named plaintiff in this case, merged into Mid Atlantic Medical Services, LLC (formerly MU Acquisition LLC) upon acquisition by United-Health Group Incorporated on February 10, 2004, with Mid Atlantic Medical Services, LLC as the survivor.

Mid Atlantic Medical Services, LLC is owned 100% by UnitedHealth Group Incorporated, a publicly held company.

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IN THE

Supreme Court of the United States

No. 05-260

JOEL SEREBOFF and MARLENE SEREBOFF,
Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Mid Atlantic Medical Services, LLC respectfully suggests that the Court may reasonably deny the petition. The conflict among the circuits is not as deep as petitioners suggest, and it may eventually resolve itself.

STATEMENT OF THE CASE

The narrow question presented in this case is whether the fiduciary of an employer-sponsored health plan may obtain an equitable lien or constructive trust under ERISA §502(a)(3) on specifically identifiable proceeds from a settlement between a plan participant and a third-party tortfeasor when the terms of the plan expressly provide that third-party recoveries must be used to reimburse the plan for medical expenses it paid on the participant's behalf. There is no need for the Court to review the decision in this case because the Fourth

Circuit's decision properly interprets §502(a)(3) and gives effect to the purposes of ERISA both in adequately protecting insureds and in controlling health care costs for employers.

Three years ago in *Great-West Life & Annuity Inc.* v. *Knudson*, 534 U.S. 204 (2002), the Court suggested that a plan fiduciary could bring suit under §502(a)(3) if the basis for the claim and the remedy sought were "typically available in equity." The Court noted that a party traditionally could state a valid claim for equitable restitution if the disputed funds are specifically identifiable, belong in good conscience to the plan, and are within the possession and control of the defendant. See *Great-West*, 534 U.S., at 213.

Most courts to subsequently address the issue, including the Fourth Circuit in this case, have correctly recognized that a plan fiduciary's reimbursement action comfortably fits within the narrow confines of traditional equity recognized in *Great-West* when the disputed funds are specifically identifiable and within the defendant's possession and control. Consistent with *Great-West*'s instructions, the approach of the Fourth, Fifth, Seventh, and Tenth Circuits properly considers whether the basis of the claim is equitable in nature *and* whether the relief sought is an equitable remedy. In this case, the basis of the fiduciary's claims—equitable restitution to enforce subrogation or reimbursement rights with respect to specific property in the defendant's possession that belongs in good conscience to the claimant—was typically available in equity and existed (whether or not there was a contractual relationship between the parties) in order to prevent unjust enrichment. Likewise, the remedies sought by the plan fiduciary—a constructive trust or an equitable lien—were quintessential equitable responses. Only two circuits, the Sixth and the Ninth, have erroneously held to the contrary, essentially holding that an ERISA-based claim for reimbursement will never be an equitable claim.

Petitioners are correct in noting that the circuits are split on this issue, but the Court may reasonably consider denying certiorari in this case because the circuit split is relatively new and may eventually resolve itself.

STATEMENT OF FACTS

The Sereboffs, who live in Maryland, were beneficiaries under a self-funded health plan sponsored and maintained by the Katzen Eye Group, Marlene Sereboff's employer. Mid Atlantic serves as fiduciary of the plan. On June 22, 2000, the Sereboffs were visiting California and were in the process of returning a vehicle to a rental-car facility at San Jose International Airport when another vehicle struck them. The plan paid the Sereboffs' medical expenses, which totaled $74,869.37.

The plan contains an "ACTS OF THIRD PARTIES" subrogation provision that gives the plan the "right to recover any payments" made to beneficiaries by third parties for injuries caused by the acts of "another person or party." Pet. App. 38a-39a. When the plan pays out benefits, "*[a]ll recoveries* from a third party (whether by lawsuit, settlement, or otherwise) *must be used to reimburse the Company* . . . to reflect that portion of the total recovery which is due the Company for benefits paid." *Id.*, at 38a (emphasis added). The subrogation provision also obligates beneficiaries to "promptly advise [Mid Atlantic] whenever a claim is made against a third party" and obligates them to execute any assignments or liens that the plan requests. *Id.*, at 38a-39a.

The Sereboffs initiated a state-court action in California in August 2001 against the joint tortfeasors. In late 2000 and early 2001, the plan reminded the Sereboffs and their lawyer that the plan was entitled to reimbursement should the California litigation be successful, and it asked the Sereboffs to execute subrogation-lien agreements acknowledging their obligations under the plan. *Id.*, at 39a-45a. The Sereboffs

initially ignored the plan's requests and ultimately refused to execute the proposed agreements. The plan paid additional benefits throughout 2001 and 2002, and it repeatedly sent updates to the Sereboffs and their lawyer about the current value of the plan's anticipated subrogation liens. *Ibid.* In January 2003, the California litigation settled, and the defendants paid the Sereboffs $750,000. The Sereboffs never discharged the amount of the plan's asserted liens. Instead, the Sereboffs' lawyer disbursed the funds to the Sereboffs and to his law firm. The Sereboffs then placed the funds into their investment accounts. After a March 2003 letter from the plan that again informed the Sereboffs of the amount of its liens and requested reimbursement upon settlement, the Sereboffs' lawyer responded that the liens were not collectable, citing *Great-West* and *Westaff (USA) Inc.* v. *Arce*, 298 F.3d 1164 (CA9 2002). Pet. App. 45a.

In August 2003, Mid Atlantic instituted this action in the District of Maryland under §502(a)(3) of ERISA, which authorizes ERISA participants or fiduciaries to enjoin any act violating the terms of an ERISA plan or to "obtain other appropriate equitable relief" to enforce a plan's provisions. 29 U.S.C. §1132(a)(3). Mid Atlantic asserted the plan's subrogation rights and requested, among other forms of relief, restitution of and a constructive trust over the disputed funds held by the Sereboffs in their investment accounts. Mid Atlantic also sought emergency relief to prevent dissipation of the disputed funds, and the Sereboffs agreed to "preserve $74,869.37 of the settlement funds" until the dispute is resolved. Pet. App. 6a.

Mid Atlantic moved for summary judgment, asserting that the claim to "recover the disputed proceeds" sought appropriate "equitable relief" under §502(a)(3) of ERISA. Pet. App. 6a. The Sereboffs responded that Mid Atlantic's claim sought monetary damages that are not permissible under ERISA. *Ibid.* The district court granted in part Mid

Atlantic's summary-judgment motion, holding that Mid Atlantic's claim was cognizable under §502(a)(3) and that the plan was entitled to reimbursement of $74,869.37, plus interest. Pet. App. 6a. The district court reduced the reimbursement award to account for the plan's prorated share of the reasonable attorneys' fees and court costs from the California litigation. *Id.*, at 7a.

The Fourth Circuit affirmed, agreeing that the basis of Mid Atlantic's claim and the remedy sought were equitable in nature. The court of appeals explained that Mid Atlantic's action was for equitable restitution because the disputed funds "have not been dissipated," "are specifically identifiable," "belong in good conscience" to the plan, and "are within the possession and control of the Sereboffs." Pet. App. 11a, *Mid Atl. Med. Servs., LLC* v. *Sereboff*, 407 F.3d 212, 218-219 (CA4 2005), *petition for cert. filed*, 74 U.S.L.W. 3130 (U.S. Aug. 25, 2005) (No. 05-260). The court of appeals noted that "[r]ecent decisions by the Fifth, Seventh, and Tenth Circuits support our determination" that Mid Atlantic's claim lies in equity. Pet. App. 12a. The court of appeals also recognized that its ruling "appears to be at variance with recent decisions by the Sixth and Ninth Circuits." *Id.*, at 13a n.7. The Sereboffs' petition for panel rehearing and rehearing en banc was denied.

REASONS TO DENY THE PETITION

Petitioners correctly assert a conflict among the courts of appeals on the question presented. The Sixth and Ninth Circuits interpret §502(a)(3) of ERISA as categorically barring a plan fiduciary's subrogation and reimbursement rights under a plan agreement. *Qualchoice, Inc.* v. *Rowland*, 367 F.3d 638 (CA6 2004), *cert. denied*, 125 S.Ct. 1639 (2005); *Westaff*, 298 F.3d, at 1164. The Fourth, Fifth, Seventh, and Tenth Circuits allow equitable subrogation under §502(a)(3) when the disputed funds are specifically identifiable, belong in good conscience to the plan, and are within the possession and

control of the defendant. Pet. App. 11a, *Sereboff*, 407 F.3d, at 218-219; *Bombardier Aerospace Employee Welfare Benefits Plan* v. *Ferrer*, 354 F.3d 348, 356-358 (CA5 2003), *cert. denied*, 541 U.S. 1072 (2004); *Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan* v. *Willard*, 393 F.3d 1119, 1122 (CA10 2004); *Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan* v. *Varco*, 338 F.3d 680, 687 (CA7 2003), *cert. denied*, 124 S.Ct. 2904 (2004). Numerous courts have recognized the disagreement. See, *e.g.*, *Sereboff*, 407 F.3d, at 218-219 & n.7; *Willard*, 393 F.3d, at 1125; *Qualchoice*, 367 F.3d, at 645-647; *Bombardier*, 354 F.3d, at 357-358 & n.43; *Space Gateway Support* v. *Prieth*, 371 F.Supp.2d 1364, 1368 & n.4 (M.D. Fla. 2005); *Eldridge* v. *Wachovia Corp. Long-Term Disability Plan*, 383 F.Supp.2d 1367, 1371 (N.D. Ga. 2005); *Scholastic Corp.* v. *Najah Kassem & Casper & De Toledo LLC*, No. 3:04-CV-1752, 2005 WL 2276042, at *1 (D. Conn. Sept. 19, 2005).

The mere existence of a conflict among the circuits does not, without more, mean that the Court should grant the petition. The Court may reasonably inquire further regarding the depth of the split and the likelihood that it will be resolved without the Court's intervention. The approach of the Sixth and Ninth Circuits is clearly flawed, and a majority of courts (both courts of appeals and district courts) now interpret §502(a)(3) as allowing subrogation involving specifically identifiable funds in the defendant's possession. The Court might reasonably conclude that the Ninth and Sixth Circuits will eventually bring themselves into line with the growing number of courts that permit equitable-subrogation actions under §502(a)(3).

I. The Court Should Deny the Petition Because the Circuit Split May Resolve Itself.

The narrow issue before the Court is whether the recovery Mid Atlantic seeks on behalf of the plan—equitable subrogation in the form of a constructive trust or equitable

lien on an identifiable fund in the defendant's possession—is "appropriate equitable relief" under §502(a)(3) of ERISA. 29 U.S.C. §1132(a)(3). The Court has previously explored the meaning of "appropriate equitable relief" under §502(a)(3). In *Mertens* v. *Hewitt Associates*, the Court rejected a damages claim brought by plan participants against the plan's actuary, explaining that the equitable relief available under §502(a)(3) must have been "*typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." 508 U.S. 248, 256 (1993).

Three years ago, the Court clarified its comments in *Mertens* regarding restitution, explaining that some forms of restitution may not be sufficiently equitable to authorize suit under §502(a)(3). See *Great-West*, 534 U.S., at 215. The Court held that *legal* (as opposed to *equitable*) restitution is not available under §502(a)(3). "Whether [restitution] is legal or equitable in a particular case (and hence whether it is authorized by §502(a)(3)) remains dependent on the nature of the relief sought." *Ibid.* According to *Great-West*, a plaintiff states a claim for equitable restitution when "money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.*, at 213. On the other hand, a plaintiff seeks legal restitution not cognizable under §502(a)(3) when, in reality, she seeks solely "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money," because such actions are "essentially actions at law for breach of contract." *Ibid.* (quotation omitted). In other words, a restitution claim is considered legal when the plaintiff "could *not* assert title or right to possession of particular property" but nevertheless "might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him." *Ibid.*

The claim in *Great-West* was for legal restitution, reasoned the Court, because the insurance company sought personal

liability against Knudson. See *id.*, at 213-214. The lawsuit could not have claimed a right to possession of specific funds in Knudson's possession, because "the funds to which petitioners claim[ed] an entitlement under the Plan's reimbursement provision—the proceeds from the settlement of respondents' tort action—[were] not in [Knudson's] possession." *Id.*, at 214. Unlike the Sereboffs' settlement proceeds, which remain in their investment accounts, Knudson's settlement proceeds were located in a special-needs trust that she did not possess or control. *Ibid.* Identifying forms of relief typically available in equity, the Court observed that equitable restitution generally comes "in the form of a constructive trust or an equitable lien," *id.*, at 212-213, which could not have been claimed in the insurance company's suit against Knudson personally.

A. Most Courts of Appeals Agree About How to Resolve the Question Presented in This Case.

Since *Great-West*, several courts of appeals have noted the split of authority over how to apply *Great-West* in determining the true nature of relief sought in ERISA actions like this case. See, *e.g.*, *Sereboff*, 407 F.3d, at 218-219 & n.7 (noting that its approach, as well as that of the Fifth, Seventh, and Tenth Circuits, is "at variance" with the decisions by the Sixth and Ninth Circuits); *Willard*, 393 F.3d, at 1125; *Qualchoice*, 367 F.3d, at 645-647; *Bombardier*, 354 F.3d, at 357-358 & n.43. District courts in circuits that have not taken a position on the question have both recognized the circuit split and have come to different conclusions about how to apply *Great-West* when the plaintiff seeks restitution of identifiable funds in the defendant's possession. See, *e.g.*, *Space Gateway*, 371 F.Supp.2d, at 1368 & n.4; *Eldridge*, 383 F.Supp.2d, at 1367; *Scholastic Corp.*, 2005 WL 2276042, at

*1 ("To date, at least, the Supreme Court has declined to grant a writ of *certiorari* despite the clear circuit conflict.").[1]

The Fourth Circuit has joined the majority position—which the Fifth, Seventh, and Tenth Circuits and an increasing number of district courts have adopted—in deciding that Mid Atlantic was entitled to equitable subrogation of the disputed funds in the Sereboffs' accounts. The majority approach applies a three-part test, derived directly from *Great-West*, to determine whether a remedy sought by a plan is equitable: "Does the Plan seek to recover funds (1) that are specifically identifiable, (2) that belong in good conscience to the Plan, and (3) that are within the possession and control of the defendant beneficiary?" *Bombardier*, 354 F.3d, at 356 (paraphrasing *Great-West*, 534 U.S., at 213); see also *Sereboff*, 407 F.3d, at 218-219; *Willard*, 393 F.3d, at 1122; *Varco*, 338 F.3d, at 687. These courts distinguish *Great-West* on the ground that the disputed funds sought by Great-West were not possessed and controlled by the plan beneficiary.

"By and large, the second group of circuits—the Sixth and the Ninth—have taken the opposite approach to the first group" and have inappropriately "fixated on" and misinterpreted "the basis of the plan's claim." *Scholastic Corp.*, 2005 WL 2276042, at *8. Every case in the circuit split involves a plaintiff ERISA plan that sues a plan participant who has breached the subrogation or reimbursement terms of the plan agreement. *Ibid.* "For the Sixth and Ninth Circuits, the fact that the plan's claim originates in the plan's contract and seeks [money] is entirely determinative of whether the

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[1] Respondent acknowledges that the United States, in response to a call for the views of the Solicitor General in another case involving the same issue under §502(a)(3), has supported the Fourth Circuit's result and mentioned this case as a possible candidate for resolving the disagreement among the courts of appeals. Brief for the United States as Amicus Curiae, at 6 & n.3, *Carpenters Health & Welfare Trust for S. Cal.* v. *Vonderharr*, No. 04-1049 (U.S. Oct. 21, 2005).

plan is seeking relief that is permissible under ERISA." *Ibid.* For example, the Sixth Circuit in *Qualchoice* reasoned that "the source of the claim . . . [was] a contract to pay money" and that constructive trusts and equitable liens were not traditionally available "in a breach of contract action." 367 F.3d, at 649. In a factually similar suit, the Ninth Circuit recently reaffirmed its refusal to consider subrogation claims for constructive trusts or equitable liens of identifiable funds in the defendant's possession, reasoning that such claims must be disguised breach-of-contract claims arising from the plan agreement. See *Carpenters Health & Welfare Trust for S. Cal.* v. *Vonderharr*, 384 F.3d 667, 672-673 (CA9 2004), *petition for cert. filed*, 73 U.S.L.W. 3466 (U.S. Jan. 31, 2005) (No. 04-1049).

B. The Conflict May Resolve Itself Without the Court's Intervention.

Although there is disagreement among the courts of appeals about how to decide when restitution is equitable in nature, the question may be resolved in the near future without review by the Court. Recently, most courts considering the question for the first time have trended toward the approach of the Fourth, Fifth, Seventh, and Tenth Circuits. See, *e.g.*, *Sereboff*, 407 F.3d, at 212; *Bombardier*, 354 F.3d, at 348; *Willard*, 393 F.3d, at 1119; *Space Gateway*, 371 F.Supp.2d, at 1364; *Eldridge*, 383 F.Supp.2d, at 1367; *Scholastic Corp.*, 2005 WL 2276042, at *1; see also *N. Am. Coal Corp.* v. *Roth*, 395 F.3d 916, 917 (CA8 2005), *cert. denied*, __ U.S. __, 2005 WL 1452399 (U.S. Oct. 3, 2005) (No. 04-10618). Although the Sixth Circuit deepened the circuit split just last year, *Qualchoice*, 367 F.3d, at 638, and the Ninth Circuit recently reconfirmed its erroneous interpretation of equitable restitution under §502(a)(3), *Vonderharr*, 384 F.3d, at 667, still, the chronological development of the split and the reasoning of the Sixth and Ninth Circuits

suggest that the Court's intervention may not be required in order for there to be an eventual resolution of the conflict.

Just seven months after the Court decided *Great-West*, the Ninth Circuit became the first circuit to take a position on the question now dividing the courts of appeals. In *Westaff*, the plan fiduciary brought an action "seeking a declaratory judgment that the funds in escrow belonged to it and seeking specific performance of [the plan participant's] obligation to reimburse" the plan. 298 F.3d, at 1166. Observing that the Supreme Court has instructed courts to look at "the 'substance of the remedy sought . . . rather than the label placed on that remedy,'" the Ninth Circuit concluded that the plan fiduciary sought "to enforce a contractual obligation for the payment of money, a classic action at law and not an equitable claim." *Ibid.* (quoting *Watkins* v. *Westinghouse Hanford Co.*, 12 F.3d 1517, 1528 n.5 (CA9 1993)). The court expressly indicated that the participant's possession of an identifiable fund did not change the nature of the action. *Ibid.* The Ninth Circuit reached an identical holding two years later in *Providence Health Plan* v. *McDowell*, 385 F.3d 1168 (CA9 2004), reasoning that the fiduciary's claim for specific performance was, "at bottom, . . simply [an] attempt[] to enforce a contractual obligation for repayment." *Id.*, at 1174.

Although the Ninth and Sixth Circuits' recent decisions in *Vonderharr* and *Qualchoice* have deepened the conflict, it is still not beyond reasonable hope that the split will be resolved. These decisions, while in conflict with the decisions of the Fourth, Fifth, Seventh, and Tenth Circuits, do not clearly commit these circuits to their current course, and it is possible that en banc decisions could bring both circuits into alignment with the other circuits.[2] Consequently, a

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[2] Although the Sixth and Ninth Circuits denied en banc petitions in *Qualchoice, Inc.* v. *Rowland*, 367 F.3d 638 (CA6 2004), *reh'g en banc denied*, 02-3614 (Sept. 10, 2004), and *Carpenters Health & Welfare Trust for Southern California* v. *Vonderharr*, 384 F.3d 667 (CA9 2004), *reh'g*

decision from this Court does not seem to be the only potential avenue for eventual judicial resolution, and the conflict may ultimately mend itself as more and more courts accept the sound analysis adopted by the Fourth Circuit.

Legislative resolution is also a possibility. Recent proposed legislation—if enacted—would resolve the question presented in the petition and presents an alternative basis for denying the petition. Section 162 of the proposed Healthy America Act of 2005 would amend ERISA §502(a)(3) to explicitly permit "recovery of amounts on behalf of the plan by a fiduciary enforcing the terms of the plan that provide a right of recovery by reimbursement or subrogation with respect to benefits provided to a participant or beneficiary." S. 4, 109th Cong. §162 (2005). Mid Atlantic acknowledges that enactment of the Senate bill is highly unlikely. The bill is lengthy, highly technical, and contains numerous controversial provisions. In addition to clarifying the right of fiduciaries to enforce a plan's subrogation rights under §502(a)(3), the bill aims more broadly to reform the medical-liability system, change tax laws to help low-income individuals and small businesses purchase health insurance, provide grants to faith-based and community organizations to help more families sign up for available health coverage, and cap noneconomic damages and limit contingency fees in medical-malpractice cases. See generally S. 4, 109th Cong. (2005). Given the unpredictability of the legislative process, it is admittedly doubtful that the proposed amendment to §502(a)(3) will be enacted. But, as long as legislative clarification remains a possibility, the Court could reasonably decline to grant the writ in this case.

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en banc denied, 03-55312 (Nov. 3, 2004), that does not mean that the courts might not grant en banc rehearing in a future case in response to the growing circuit precedent in opposition to those courts' view.

II. THE FOURTH CIRCUIT PROPERLY INTERPRETED §502(A)(3) AND THEREBY PROTECTED IMPORTANT FEDERAL INTERESTS.

The Fourth Circuit's analysis properly considers both the source of the fiduciary's claim and the nature of the remedies sought, as *Great-West* requires. The approach of the Sixth and Ninth Circuits—which reflexively bars subrogation claims under §502(a)(3) merely because they involve giving effect *to a contract* and ultimately *seek money*—is misfounded for several reasons.

First, the concern that a plaintiff's reimbursement rights may arise from contract ignores that §502(a)(3) clearly contemplates the provision of "equitable relief" to "redress such violations or . . . to enforce any provisions of . . . the terms of" employee-benefit contracts. 29 U.S.C. §1132(a)(3). A plan fiduciary's route into federal court, after all, is by suing to enforce (or to redress violations of) the terms of an ERISA-plan contract. The fact that a plan's claim is, in this immaterial sense, "contractual" does not even begin to suggest that the relief sought cannot be equitable. As the United States has noted, "[t]his Court has long recognized that a *contractual* obligation to pay an attorney out of specific funds creates a lien on those funds that may be enforced through a suit in equity. *Barnes* v. *Alexander*, 232 U.S. 117, 121-123 (1914); *Wylie* v. *Coxe*, 56 U.S. 415, 420 (1854). The same rationale applies here."[3] Although *Great-West* excludes a claim that seeks only "to impose personal liability . . . for a contractual obligation," 534 U.S., at 210, the plans in these cases, rather than seeking personal financial liability from the participants' pockets, have asserted a right to a limited portion of a settlement paid into their accounts from a third-

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[3] Brief for the United States as Amicus Curiae, at 7-8, *Carpenters Health & Welfare Trust for S. Cal.* v. *Vonderharr*, No. 04-1049 (U.S. Oct. 21, 2005).

party tortfeasor—an extant enrichment in the defendant's possession that belongs in good conscience to the plan. In this case, the plan fiduciary does not seek personal liability against the Sereboffs, but an equitable lien or constructive trust on particular "recoveries from a third party" in the defendants' possession that "must be used to reimburse the Company . . . to reflect that portion of the total recovery which is due the Company for benefits paid." Pet. App. 38a.

Second, the basis of the plans' claims is clearly equitable. The mere fact that the plan fiduciaries "may also have a right to recover from [the plan participants] for breach of contract does not alter the equitable nature of the suit to enforce an equitable lien to recover from a designated fund money rightfully owed" to the plans. *Scholastic Corp.*, 2005 WL 2276042, at *12. As the Court has consistently affirmed for over a century, "'The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties.'" *Pearlman* v. *Reliance Ins. Co.*, 371 U.S. 132, 137 n.12 (1962) (quoting *Memphis & L.R.R. Co.* v. *Dow*, 120 U.S. 287, 301-302 (1887)). One of the American "standard current works" on equitable remedies, which *Great-West* advised courts to consult, 534 U.S., at 217, explains that an insurer's subrogation right is driven by the fundamentally equitable desire to prevent unjust enrichment, rather than to make the insurer whole through breach-of-contract damages: "When the insurer's case is based upon the subrogation right, . . . principles of unjust enrichment are controlling, because in this context equitable lien is merely a remedy for preventing unjust enrichment." 4 GEORGE E. PALMER, LAW OF RESTITUTION §23.18(d), at 470 (1978). Moreover, the leading English treatise on restitution explains that "subrogation was known to the Chancellor in the seventeenth century," even before the common law developed legal restitution, and that subrogation "arises independently of, and 'not by force of,' contract and will be granted if it is just

and equitable to do so." ROBERT GOFF & GARETH JONES, THE LAW OF RESTITUTION §3-004, at 123 (Gareth Jones ed., 6th ed. 2002).[4]

Third, the approach of the Sixth and Ninth Circuits inexplicably discounts the fact that the nature of the relief sought by the plans—a constructive trust or equitable lien—is quintessentially equitable. *Great-West*, 534 U.S., at 213. Furthermore, the fact that the plaintiffs ultimately seek money is not, of itself, a bar to recovery under §502(a)(3). *Ibid.* ("[A] plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession.").

In addition to being correct as a matter of law under *Mertens* and *Great-West*, the Fourth Circuit's approach protects important federal interests. The enforceability of subrogation rights affects millions of employers and employees who participate in ERISA plans. When enforced in a manner consistent with the Fourth Circuit's decision, reimbursement and subrogation reduce the costs of health care coverage by allowing ERISA plans to use subrogation recoveries to pass on savings to employers and employees in the form of lower health care costs. If employees' medical

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[4] Moreover, the plans' subrogation claims are unmistakably analogous to a subcontractor's equitable-subrogation claim against a landowner. When the landowner has set aside a designated fund to pay the general contractor as work progresses, a subcontractor who has performed services on the land but has not yet been paid may assert a right of subrogation and seek an equitable lien on the fund in order to prevent the contractor from recovering twice: once in the form of the subcontractor's unpaid services and a second time in the form of money from the landowner paid into the designated fund. *Scholastic Corp.*, 2005 WL 2276042, at *11 (citing 3 DAN B. DOBBS, LAW OF REMEDIES §12.20(3), at 470 (2d ed. 1993)).

expenses skyrocket, so does a company's liability. Enforcing the kind of reimbursement and subrogation rights at issue in this case—in which a plan participant has received medical benefits from the plan, later recovers money subject to the reimbursement provisions of the plan, and controls those funds in an identifiable account—not only prevents the participant's unjust enrichment but protects the financial viability of employer-sponsored plans.[5]

Finally, by joining the majority position, the Fourth Circuit's decision has furthered the federal interest in making the interpretation of ERISA more uniform. Many ERISA fiduciaries and employers operate nationally and want ERISA to apply consistently across jurisdictions. When enforcement of subrogation clauses is inconsistent, ERISA fiduciaries find themselves in the unfortunate situation of having to weigh their options when deciding where to bring suit.[6]

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[5] As petitioners acknowledge, the Department of Labor and the Solicitor General have recognized that enforcing the plans' subrogation and reimbursement rights in this context safeguards the important federal interest in ensuring the continued financial stability of plan assets. Pet. 14-15 & nn.15-16; see also Brief for the United States as Amicus Curiae, at 10, *Carpenters Health & Welfare Trust for S. Cal.* v. *Vonderharr*, No. 04-1049 (U.S. Oct. 21, 2005).

[6] Without foundation, the petitioners conclude that Mid Atlantic engaged in forum shopping when it filed suit in the District of Maryland. Pet. 17. That baseless allegation ignores that, from an early stage in the California litigation, Mid Atlantic asserted that the plan agreement was a Maryland contract, that the petitioners were at all relevant times Maryland residents, that Mid Atlantic's headquarters are located in Maryland, and that the Fourth Circuit had not decided the issue presented when Mid Atlantic instituted this action.

CONCLUSION

The Court may reasonably deny the petition if the Court concludes that imminent resolution of the circuit split is not immediately necessary.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOEL SEREBOFF and MARLENE SEREBOFF,

Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners Joel and Marlene Sereboff respectfully submit this reply brief in further support of their petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit in this case.

I. NOTHING PRESENTED IN THE OPPOSITION WARRANTS DENYING THE PETITION.

In its Opposition to Petition for Writ of Certiorari ("Opposition"), Mid-Atlantic Medical Services, Inc. ("Mid-Atlantic") implicitly acknowledges that this case satisfies all of the criteria for Supreme Court review. For example, Mid-Atlantic admits in its Opposition that there is a split among the circuits regarding the Question Presented. *See* Opposition at 5 ("Petitioners correctly assert a conflict among the courts of appeal on the questions presented"). While Mid-Atlantic does not explicitly address the issue of whether this case is a matter of exceptional importance, it acknowledges that the Department of Labor and the Solicitor General recognize the importance of this issue. *See* Opposition at 16, fn. 5.

The only basis Mid-Atlantic offers for denying the Petition here is its assertion that the split between the Fourth, Fifth, Seventh and Tenth Circuits, on the one hand, and the Ninth and Sixth Circuits, on the other hand, may eventually be resolved by *en banc* rehearings or legislative action. This assertion has no basis.

Mid-Atlantic claims that the split could resolve itself because "it is possible that en banc decisions could bring both [the Ninth and the Sixth] circuits into alignment with the other circuits." *See* Opposition at 11. However, a footnote in Mid-Atlantic's own opposition undercuts this argument. In footnote 2, Mid-Atlantic acknowledges that both the Ninth and Sixth Circuits have rejected petitions for rehearing on the very issue at stake in this Petition. Opposition at 11-12, n 2. Hence, there is no reason to believe that an *en banc* decision from either circuit reversing their entrenched positions is forthcoming.

Mid-Atlantic also suggests that the circuit split could resolve itself via legislative action. However, Mid-Atlantic later acknowledges that: "Given the unpredictability of the legislative process, it is admittedly doubtful that the proposed amendment to § 502(a)(3) will be enacted." *See* Opposition at 12.

In sum, Mid-Atlantic has only offered speculation as to how the present deep split among the circuits may be resolved. Such speculation should be given no weight.

II. THE SOLICITOR GENERAL HAS RECOGNIZED THAT THIS CASE IS THE APPROPRIATE VEHICLE FOR RESOLVING THE SPLIT AMONG THE CIRCUITS.

In a brief filed as amicus curiae in United States Supreme Court Case No. 04-0109, *Carpenters Health and Welfare Trust for Southern California, Petitioner v. Timothy Vonderharr et al.*, (U.S. October 21, 2005) the Solicitor General acknowledges that this case is the appropriate

vehicle for resolving the current split among the circuits. The Solicitor General observed:

> The petition for a writ of certiorari in *Sereboff* presents the Section 502(a)(3) question. The respondent in *Sereboff* is a plan fiduciary entitled to generally to bring an action under 29 U.S.C. 1132(a)(3). *See* note 2., *supra*. Although the respondent in *Sereboff* originally waived its right to file a response in the certiorari petition, this Court requested on September 27, 2005, that a response be filed. Based upon our review of the petition and the lower court decision in *Sereboff*, it appears that *Sereboff* squarely presents the Section 502(a)(3) issue and would likely be an appropriate case in which this Court could resolve the conflict in the circuits.

Amicus Curiae at 6, n. 3.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 19 2006
OFFICE OF THE CLERK

No. 05-260

IN THE

Supreme Court of the United States

JOEL SEREBOFF and MARLENE SEREBOFF,

Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 25, 2005
CERTIORARI GRANTED NOVEMBER 28, 2005

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The following Opinions and Orders and Declaratory Judgment have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

Appendix A – Opinion Of The United States Court Of Appeals For The Fourth Circuit Decided May 4, 2005..... 1a

Appendix B – Memorandum Opinion And Order Of The United States District Court For The District Of Maryland Filed May 10, 2004 ..... 20a

Appendix C – Opinion And Declaratory Judgment And Order Of The United States District Court For The District Of Maryland Decided January 26, 2004... 24a

Appendix D – Order Of The United States Court Of Appeals For The Fourth Circuit Denying Petition For Rehearing And Suggestion For Rehearing *En Banc* Filed June 1, 2005..... 46a

U.S. District Court
District of Maryland (Baltimore)
CIVIL DOCKET FOR CASE #: 1:03-cv-02269-AMD

Mid Atlantic Medical Services, Inc. v. Sereboff et al
Assigned to: Judge Andre M Davis
Cause: 29:1132 E.R.I.S.A.- Employee Benefits

Date Filed: 08/05/2003
Jury Demand: None
Nature of Suit: 791 Labor: E.R.I.S.A.
Jurisdiction: Federal Question

Plaintiff

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ATTORNEY TO BE NOTICED

Defendant

Marlene Sereboff represented by **Martin Eugene Wolf**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

John Charles Stein
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

John Stein
TERMINATED: 08/29/2003

Defendant

The Boccardo Law Firm, LLP
TERMINATED: 08/29/2003

Date Filed	#	Docket Text
08/05/2003	1	COMPLAINT and Exhibits A-F against Joel Sereboff, Marlene Sereboff, John Stein, The Boccardo Law Firm, LLP (Filing fee S 150

		receipt number 1196894.), filed by Mid Atlantic Medical Services, Inc.(raf, Deputy Clerk) Additional attachment(s) added on 8/5/2003 (raf, Deputy Clerk). (Entered: 08/05/2003)
08/05/2003	2	MOTION for Preliminary Injunction, MOTION for Temporary Restraining Order by Mid Atlantic Medical Services, Inc. (Attachments: # 1 Memorandum in Support# 2 Text of Proposed Order)(raf, Deputy Clerk) (Entered: 08/05/2003)
08/05/2003	3	Summons Issued (20 days) as to Joel Sereboff, Marlene Sereboff, John Stein, The Boccardo Law Firm, LLP. (raf, Deputy Clerk) (Entered: 08/05/2003)
08/05/2003	4	Correspondence from the Clerk re: warning letter. (raf, Deputy Clerk) (Entered: 08/05/2003)
08/07/2003	5	MOTION to Appear Pro Hac Vice the admission of Holly J. Schimmel by Mid Atlantic Medical Services, Inc.. (eg, Deputy Clerk) (Entered: 08/07/2003)
08/07/2003	6	MARGINAL ORDER granting 5 Motion to Appear Pro Hac Vice the admission of Holly J. Schimmel; FEE PAID. Signed by Clerk on 8/7/03. (eg, Deputy Clerk) (Entered: 08/07/2003)

08/11/2003	7	STIPULATION re 2 MOTION for Preliminary Injunction MOTION for Temporary Restraining Order *Order Granting Stipulation to Preserve Funds, Withdraw Motion for a Preliminary Injunction, and Briefing Schedule* by Mid Atlantic Medical Services, Inc.. (Stawinski, Michelle) (Entered: 08/11/2003)
08/13/2003	8	MOTION to Appear Pro Hac Vice the admission of Thomas H. Lawrence by Mid Atlantic Medical Services, Inc.. (eg, Deputy Clerk) (Entered: 08/13/2003)
08/13/2003	9	MARGINAL ORDER granting 8 Motion of Mid Atlantic Medical Services, Inc. to Appear Pro Hac Vice the admission of Thomas H. Lawrence. Signed by Clerk on 8/13/03. (SEE DOCUMENT #8)(eg, Deputy Clerk) (Entered: 08/13/2003)
08/26/2003	10	ORDER granting 2 Motion for Preliminary Injunction, granting 2 Motion for TRO. Signed by Judge J. Frederick Motz on 8/5/03. (eg, Deputy Clerk) (Entered: 08/26/2003)
08/26/2003	11	MARGINAL ORDER APPROVING 7 Stipulation, filed by Mid Atlantic Medical Services, Inc.. Signed by Judge J. Frederick Motz on 8/11/03. (eg, Deputy Clerk) (Entered:

		08/26/2003)
08/27/2003	12	NOTICE by Mid Atlantic Medical Services, Inc. *of Partial Dismissal Without Prejudice* (Stawinski, Michelle) (Entered: 08/27/2003)
08/29/2003	13	PAPERLESS ORDER APPROVING 12 Notice of Partial Dismissal, without prejudice filed by Mid Atlantic Medical Services, Inc.. per Judge Andre M Davis on 8/29/03. (eg, Deputy Clerk) (Entered: 08/29/2003)
09/04/2003	14	STIPULATION *of Facts (Jointly Submitted)* by Mid Atlantic Medical Services, Inc.. (Attachments: # 1 Exhibit 1# 2 Exhibit 2# 3 Exhibit 3 - 4# 4 Exhibit 5 - 8# 5 Exhibit 9 - 11# 6 Exhibit 12 - 14# 7 Exhibit 15 - 17# 8 Exhibit 18 - 20# 9 Exhibit 21 - 22# 10 Exhibit 23 - 25# 11 Exhibit 26# 12 Exhibit 27)(Stawinski, Michelle) (Entered: 09/04/2003)
09/08/2003	15	MOTION to Appear Pro Hac Vice the admission of John C. Stein by Joel Sereboff, Marlene Sereboff. (eg, Deputy Clerk) (Entered: 09/08/2003)
09/08/2003	16	MARGINAL ORDER granting 15 Motion to Appear Pro Hac Vice the admission of John C. Stein; FEE PAID. Signed by Clerk on 9/8/03. (SEE DOCUMENT #15) (eg, Deputy

		Clerk) (Entered: 09/08/2003)
09/16/2003	17	MOTION for Summary Judgment by Mid Atlantic Medical Services, Inc.. Responses due by 10/3/2003 (Schimmel, Holly) Additional attachment(s) added on 9/17/2003 (eg, Deputy Clerk). (Entered: 09/16/2003)
09/16/2003	18	MOTION for Summary Judgment *Memorandum in Support of Plaintiff's Motion for Summary Judgment* by Mid Atlantic Medical Services, Inc.. Responses due by 10/3/2003 (Attachments: # 1 Text of Proposed Order Proposed Order Granting Plaintiff's Motion for Summary Judgment)(Schimmel, Holly) Modified on 9/17/2003 (eg, Deputy Clerk). (Filed in error/documents attached to 17 Motion) (Entered: 09/16/2003)
09/23/2003	19	MEMORANDUM in support of Defendants' MOTION to Dismiss pursuant to Rule 12(b)(6) by Joel Sereboff, Marlene Sereboff. (rec'd 9/5/03) (eg, Deputy Clerk) (Entered: 09/23/2003)
09/23/2003	20	Correspondence from Clerk re: "ECF" warning Letter to counsel. (eg, Deputy Clerk) (Entered: 09/23/2003)
09/24/2003	21	MOTION Plaintiff's Motion for Clarification by Mid Atlantic Medical

		Services, Inc.. Responses due by 10/13/2003 (Attachments: # 1 Exhibit Exhibit A to Plaintiff's Motion for Clarification# 2 Text of Proposed Order)(Schimmel, Holly) (Entered: 09/24/2003)
09/24/2003	22	NOTICE by Mid Atlantic Medical Services, Inc. *Notice of Withdrawal of Appearance as Consel* (Schimmel, Holly) (Entered: 09/24/2003)
09/25/2003	23	MOTION to Dismiss *Pursuant to Rule 12(b)(6)* by Joel Sereboff, Marlene Sereboff. Responses due by 10/13/2003 (Stein, John) (Entered: 09/25/2003)
10/03/2003	24	MEMORANDUM in Opposition re 17 MOTION for Summary Judgment *Points and Authorities in Opposition to Motion for Summary Judgment* filed by Joel Sereboff, Marlene Sereboff. Replies due by 10/17/2003. (Stein, John) Modified on 10/9/2003 (eg, Deputy Clerk). (Entered: 10/03/2003)
10/10/2003	25	Declaration of John C. Stein Re Motion for Clarification filed by Joel Sereboff, Marlene Sereboff. Replies due by 10/24/2003. (Stein, John) Modified on 10/14/2003 (eg, Deputy Clerk). (Entered: 10/10/2003)
10/13/2003	26	RESPONSE to Motion re 17 MOTION for Summary Judgment, 19

		MOTION to Dismiss, 23 MOTION to Dismiss *Pursuant to Rule 12(b)(6)* filed by Mid Atlantic Medical Services, Inc.. Replies due by 10/27/2003. (Attachments: # 1 Appendix Mid Atlantic Medical Services v. Do# 2 Appendix IBEW-NECA Southwestern Health v. Tafoya# 3 Appendix Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot, and Wansbrough)(Stawinski, Michelle) (Entered: 10/13/2003)
10/27/2003	27	REPLY to Response to Motion re 17 MOTION for Summary Judgment, 23 MOTION to Dismiss *Pursuant to Rule 12(b)(6)*, 19 MOTION to Dismiss *DEFENDANTS? REPLY TO PLAINTIFF?S RESPONSE TO DEFENDANTS? MOTION TO DISMISS AND TO DEFENDANTS? RESPONSE TO PLAINTIFF?S MOTION FOR SUMMARY JUDGMENT* filed by Joel Sereboff, Marlene Sereboff. (Stein, John) (Entered: 10/27/2003)
12/04/2003	28	NOTICE by Mid Atlantic Medical Services, Inc. re 17 MOTION for Summary Judgment, 19 MOTION to Dismiss, 23 MOTION to Dismiss *Pursuant to Rule 12(b)(6)*, 24 Response to Motion,, 26 Response to Motion,, 27 Reply to Response to

		Motion, *of Supplemental Authority* (Attachments: # 1 Supplement Plumbers and Steamfitters v. Books)(Stawinski, Michelle) (Entered: 12/04/2003)
12/22/2003	29	NOTICE by Mid Atlantic Medical Services, Inc. re 17 MOTION for Summary Judgment, 19 MOTION to Dismiss, 23 MOTION to Dismiss *Pursuant to Rule 12(b)(6)*, 24 Response to Motion,, 26 Response to Motion,, 27 Reply to Response to Motion, (Attachments: # 1 Exhibit A for Notice of Filing Supplemental Authority# 2 Exhibit B to Notice of Filing Supplemental Authority)(Lawrence, Thomas) (Entered: 12/22/2003)
01/27/2004	30	MEMORANDUM OPINION. Signed by Judge Andre M Davis on 1/26/04. (Attachments: # 1 Stipulation of Facts)(eg, Deputy Clerk) (Entered: 01/27/2004)
01/27/2004	31	DECLARATORY JUDGMENT AND ORDER granting in part and denying in part 17 Motion of plaintiff for Summary Judgment, denying 23 Motion of defendants' to Dismiss ; DIRECTING that on or before 2/9/04 Joel Sereboff and Marlene Sereboff shall pay over to plaintiff or Designee the sum of $74,869.37 with interest at

		the rate of 6% annum dating from 3/12/03; $26,123.15 (cost and litigation expense); Reasonable Attorney Fees of 25% of the total recovery ($750,000), without prejudice as therein set forth. Signed by Judge Andre M Davis on 1/26/04. (eg, Deputy Clerk) (Entered: 01/27/2004)
02/09/2004	32	MOTION for Attorney Fees by Mid Atlantic Medical Services, Inc.. Responses due by 2/26/2004 (Lawrence, Thomas) (Entered: 02/09/2004)
02/24/2004	33	NOTICE OF APPEAL by Joel Sereboff, Marlene Sereboff. Filing fee $ 255 Receipt No. 1202023. Appeal Record due by 3/25/2004. (Stein, John) Modified on 3/10/2004 (sls, Deputy Clerk). (Entered: 02/24/2004)
03/08/2004	41	NOTICE OF CROSS APPEAL as to 30 Memorandum Opinion, 31 Order on Motion for Summary Judgment, Order on Motion to Dismiss, by Mid Atlantic Medical Services, Inc.. Filing fee $ 255, receipt number 1202205. (sls, Deputy Clerk) Additional attachment(s) added on 4/1/2004 (cags, Deputy Clerk). (Entered: 04/01/2004)
03/10/2004		Transmission of Notice of Appeal and

		Docket Sheet to US Court of Appeals re 33 Notice of Appeal (sls, Deputy Clerk) (Entered: 03/10/2004)
03/13/2004	34	Memorandum re 32 MOTION for Attorney Fees filed by Mid Atlantic Medical Services, Inc.. (Attachments: # 1 # 2)(Lawrence, Thomas) (Entered: 03/13/2004)
03/15/2004		USCA Case Number 04-1336 for 33 Notice of Appeal filed by Joel Sereboff, Marlene Sereboff. (Case Manager - Anthony Webb) (sls, Deputy Clerk) (Entered: 03/23/2004)
03/17/2004	35	MOTION Contempt by Mid Atlantic Medical Services, Inc.. Responses due by 4/5/2004 (Lawrence, Thomas) (Entered: 03/17/2004)
03/17/2004	36	Memorandum re 35 MOTION Contempt filed by Mid Atlantic Medical Services, Inc.. (Attachments: # 1 # 2)(Lawrence, Thomas) (Entered: 03/17/2004)
03/21/2004	37	PAPERLESS ORDER denying 35 Motion for Contempt AS THE COURT'S ORDER IS A MONEY JUDGMENT (IN ADDITION TO A MANDATORY ORDER) UPON WHICH EXECUTION MAY ISSUE AT PLAINTIFF'S REQUEST. Signed by Judge Andre M Davis on March 22, 2004.(Judge Davis) (Entered:

		03/21/2004)
03/25/2004	38	Correspondence re: Stay (Attachments: # 1 Exhibit Order)(Stein, John) (Entered: 03/25/2004)
03/26/2004	39	Certificate of Clerk certifying the record is complete for appeal purposes re: 33 Notice of Appeal (sls, Deputy Clerk) Additional attachment(s) added on 9/30/2004 (sls, Deputy Clerk). (Entered: 03/26/2004)
03/29/2004	40	RESPONSE in Opposition *MOTION FOR ATTORNEY FEES* filed by Joel Sereboff, Marlene Sereboff. Replies due by 4/12/2004. (Stein, John) (Entered: 03/29/2004)
04/01/2004		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 41 Notice of Cross Appeal (sls, Deputy Clerk) (Entered: 04/01/2004)
04/02/2004	42	NOTICE of Appearance by John Charles Stein on behalf of Joel Sereboff, Marlene Sereboff (Stein, John) (Entered: 04/02/2004)
04/07/2004	43	ORDER of USCA CONSOLIDATING USCA # 04-1336 and USCA # 04-1403 for purposes of briefing and oral argument as to 33 Notice of Appeal filed by Joel Sereboff, Marlene Sereboff, 41 Notice

		of Cross Appeal, filed by Mid Atlantic Medical Services, Inc. (c/s) (ko, Deputy Clerk) Additional attachment(s) added on 11/3/2004 (ko, Deputy Clerk). (Entered: 04/07/2004)
05/10/2004	44	MEMORANDUM OPINION. Signed by Judge Andre M Davis on 5/10/04. (jnl, Deputy Clerk) (Entered: 05/10/2004)
05/10/2004	45	ORDER granting plaintiff's motion for attorney's fee, expenses and prejudgment interest; ENTERING judgment in favor plaintiff against defendants jointly and severally in the amount of $19,044.75 together with interest at the legal rate of 6% per annum dating from 3/13/04 through the date of this judgment (Interest Rate 1.55%). Signed by Judge Andre M Davis on 5/10/04. (jnl, Deputy Clerk) (Entered: 05/10/2004)
06/03/2004	46	NOTICE OF APPEAL as to 44 Memorandum Opinion, 45 Judgment on Attorney Fees, by Joel Sereboff, Marlene Sereboff. Filing fee $ 255 Receipt #1204479. Appeal Record due by 7/6/2004. (Stein, John) Modified on 6/8/2004 (sls, Deputy Clerk). (Entered: 06/03/2004)
06/08/2004		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals

		re 46 Notice of Appeal (sls, Deputy Clerk) (Entered: 06/08/2004)
06/15/2004	47	USCA Case Number 04-1722 for 46 Notice of Appeal filed by Joel Sereboff, Marlene Sereboff. (Case Manager - Anthony Webb) (sls, Deputy Clerk) (Entered: 06/15/2004)
06/15/2004	48	ORDER of USCA "CONSOLIDATING" USCA case nos. 04-1336, 04-1403 and 04-1722 for purposes of briefing and oral argument as to 33 Notice of Appeal filed by Joel Sereboff, Marlene Sereboff, 46 Notice of Appeal filed by Joel Sereboff, Marlene Sereboff, 41 Notice of Cross Appeal, filed by Mid Atlantic Medical Services, Inc. (sls, Deputy Clerk) Additional attachment(s) added on 9/30/2004 (sls, Deputy Clerk). (Entered: 06/15/2004)
05/05/2005	49	JUDGMENT of USCA (certified copy)"AFFIRMING" in part "VACATING" inpart the judgment of the District Court and "REMANDING" to the District Court for further proceedings consistent with the Court's opinion as to 33 Notice of Appeal filed by Joel Sereboff, Marlene Sereboff, 46 Notice of Appeal filed by Joel Sereboff, Marlene Sereboff, 41 Notice of Cross Appeal, filed by Mid Atlantic Medical Services, Inc., (sls,

		Deputy Clerk) (Entered: 05/05/2005)
06/02/2005	50	ORDER of USCA "DENYING" petition for rehearing and rehearing en banc as to 46 Notice of Appeal filed by Joel Sereboff, Marlene Sereboff (sls, Deputy Clerk) (Entered: 06/03/2005)
06/10/2005	51	MANDATE of USCA as to 46 Notice of Appeal filed by Joel Sereboff,, Marlene Sereboff, (sls, Deputy Clerk) (Entered: 06/13/2005)
06/10/2005	52	ORDER of USCA "AWARDING" appellee costs in the amount of $329.50 as to 46 Notice of Appeal filed by Joel Sereboff, Marlene Sereboff, (sls, Deputy Clerk) Additional attachment(s) added on 6/13/2005 (sls, Deputy Clerk). (Entered: 06/13/2005)

General Docket
US Court of Appeals for the Fourth Circuit

Court of Appeals Docket #: 04-1336 Filed: 3/18/04
Nsuit: 3791 Labor: E.R.I.S.A.
Mid Atlantic Medical, et al v. Sereboff, et al
Appeal from: District of Maryland at Baltimore

- -

Lower court information:
District: 0416-1 : CA-03-2269-AMD-1

Court Reporter: Stephanie Savoy, Court Reporter Coordinator
Involved Judge: J. Frederick Motz, District Judge
Presiding Judge: Andre M. Davis, District Judge
Date Filed: 8/5/03
Date order/judgment: 1/27/04
Date NOA filed: 2/24/04

- -

Fee status: Paid

- -

Prior cases:
None
Current cases:

	Lead	Member	Start	End
Consolidated:				
	04- 1336	04- 1722	6/14/04	
Cross-appeal:				
	04- 1336	04- 1403	4/6/04	

Docket as of January 12, 2006 0:04 am Page 1

04-1336 Mid Atlantic Medical, et al v. Sereboff, et al

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v.

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MARLENE SEREBOFF Defendant - Appellant	John Charles Stein (See above) [COR NTC RET]

SECRETARY OF LABOR Amicus Supporting Appellee	Elizabeth Hopkins FAX 202-693-5610 202-693-5584 Room N-4611 [NTC GVT] Timothy David Hauser; Senior Trial Attorney 202-219-8637 Room No. N-4611 [OBR] Howard Marc Radzely FAX 202-693-5278 202-693-5260 Room S-2002 [OBR] UNITED STATES DEPARTMENT OF LABOR

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Docket as of January 12, 2006 0:04 am Page 2

04-1336 Mid Atlantic Medical, et al v. Sereboff, et al

UNITED STATES DEPARTMENT
OF LABOR
P. O. Box 1914
Washington, DC 20013

Docket as of January 12, 2006 0:04 am Page 3

04-1336 Mid Atlantic Medical, et al v. Sereboff, et al

3/18/04	Civil case docketed. (aweb) [04-1336]
3/18/04	Docketing notice issued. [04-1336] ~ [3952067] (aweb) [04-1336]
3/18/04	Docketing statement filed by Appellant Joel Sereboff, Appellant Marlene Sereboff [3952072-1] T/S needed [Y/N]: No T/S already on file?: No. [04-1336] ~ [3952072] (aweb)[04-1336]
3/18/04	Briefing order filed. Copies to all parties. [04-

1336] ~ [3952076] Appellant(s) brief/joint appendix due 4/27/04 for Marlene Sereboff, for Joel Sereboff. (aweb)[04-1336]

3/29/04 Certification of ROA complete and retained in the District Court. [04-1336] ~ [3958327] (aweb) [04-1336]

3/31/04 ORDER FILED [3959765] to extend time to file appellant(s) brief/appendix until 5/10/04 [3959765-1]. Appellant(s) brief/joint appendix now due 5/10/04 for Marlene Sereboff, for Joel Sereboff. Copies to all parties. [04-1336] ~ [3959765] (aweb) [04-1336]

4/1/04 Positive disclosure statement filed by Appellee Mid Atlantic Medical. [04-1336] (aweb) [04-1336]

4/1/04 Counsel of record form filed by Thomas Humphrey Lawrence for Appellee Mid Atlantic Medical. (aweb) [04-1336]

4/5/04 Counsel of record form filed by John Charles Stein for Appellant Joel Sereboff, Appellant Marlene Sereboff. (aweb)[04-1336]

4/6/04 Negative disclosure statement filed by Appellant Joel Sereboff, Appellant Marlene Sereboff [04-1336] (aweb) [04-1336]

4/6/04 ORDER FILED [3962352] consolidating case 04-1403 with 04-1336 [3962352-1]. XAP Appellant: Sereboff Copies to all parties. [04-1336, 04-1403] ~ [3962352] (aweb) [04-1336 04-1403]

4/6/04 Docketing notice issued. [04-1403] ~ [3962382] (aweb) [04-1403]

4/6/04 ORDER FILED [3962395] [3962395-1] rescinding briefing order dated 3/18/04 Copies to

all parties. [04-1336, 04-1403] ~ [3962395] (aweb) [04-1336 04-1403]

Docket as of January 12, 2006 0:04 am Page 4

04-1336 Mid Atlantic Medical, et al v. Sereboff, et al

4/6/04 Cross-appeal briefing order filed. [04-1336, 04-1403] ~ [3962399] Appellant(s) cross-brief/joint appendix due 5/17/04 for Marlene Sereboff in 04-1336, for Joel Sereboff in 04-1336, for Marlene Sereboff in 04-1403, for Joel Sereboff in 04-1403. (aweb) [04-1336 04-1403]

5/3/04 ORDER FILED [3977543] to extend time to file appellant(s) cross-brief appendix until 5/31/04 [3977543-1]. Appellant(s) cross-brief joint appendix now due 6/1/04 for Marlene Sereboff in 04-1336, for Joel Sereboff in 04-1336, for Marlene Sereboff in 04-1403, for Joel Sereboff in 04-1403 . Copies to all parties. [04-1336, 04-1403] ~ [3977543] (aweb) [04-1336 04-1403]

5/28/04 Motion filed by Appellant Marlene Sereboff in 04-1336, Appellant Joel Sereboff in 04-1336, Appellee Marlene Sereboff in 04-1403, Appellee Joel Sereboff in 04-1403 to extend time to file appellant(s) cross-brief appendix until 6/4/04 [3992305-1]. [04-1336, 04-1403] ~ [3992305] (aweb) [04-1336 04-1403]

6/2/04 ORDER FILED [3993196] granting motion to ext time to file a's xbrapx [3992305-1] Appellant(s) cross-brief joint appendix now due 6/4/04 for Joel Sereboff in 04-1336, for Marlene Sereboff in 04-1336, for Joel Sereboff in 04-1403, for Marlene

Sereboff in 04-1403 . in 04-1336, 04-1403 Copies to all parties. [04-1336, 04-1403] ~ [3993196] (aweb) [04-1336 04-1403]

6/4/04 Cross-brief and joint appendix filed by Appellant Marlene Sereboff in 04-1336, Appellant Joel Sereboff in 04-1336, Appellee Marlene Sereboff in 04-1403, Appellee Joel Sereboff in 04-1403. Copies of brief: 8 # brf pages: 73. Copies of apx: 6 # apx pages: 316 Sufficient[Y/N]?: Y 2-sided copying[Y/N]?: Y. N. Method of filing w/ court: HD Date of Service on parties: 6/4/04 Type of service on parties: PM Appellee cross-brief due 7/7/04 for Mid Atlantic Medical in 04-1336, for Mid Atlantic Medical in 04-1403 . [04-1336, 04-1403] ~ [3996251] (aweb) [04-1336 04-1403]

6/14/04 Docketing notice issued. [04-1722] ~ [3998861] (aweb) [04-1722]

6/14/04 ORDER FILED [3998877] consolidating case 04-1722 with 04-1336 [3998877-1]. XAP Appellant: Joel & Marlene Sereboff Copies to all parties. [04-1336, 04-1403, 04-1722] ~ [3998877] (aweb) [04-1336 04-1403 04-1722]

6/18/04 Docketing statement filed by Appellant Marlene Sereboff in 04-1722, Appellant Joel Sereboff in 04-1722 [4002739-1] T/S needed [Y/N]: No . [04-1722] ~ [4002739] (aweb) [04-1722]

7/6/04 Supplemental cross-brief filed by Appellant Marlene Sereboff in 04-1336, Appellant Joel Sereboff in 04-1336, Appellee Marlene Sereboff in 04-1403, Appellee Joel Sereboff in 04-1403, Appellant Marlene Sereboff in 04-1722, Appellant Joel Sereboff in 04-1722. Copies of brief: 8 # brf pages: 17. Sufficient[Y/N]?: Y SEALED[Y/N]?: N Method of filing w/ court: HD Date of Service on parties: 7/6/04 Type of service on parties: PM [04-1336, 04-1403, 04-1722] (dhb) [04-1336 04-1403 04-1722]

7/9/04 Consent filed by Secretary of Labor in 04-1336, Secretary of Labor in 04-1403, Secretary of Labor in 04-1722 to file amicus brief. Amicus brief tendered?(Y/N): Y. [4014530-1] Party/parties filing the amicus brief: Secretary of Labor [04-1336, 04-1403, 04-1722] (aweb) [04-1336 04-1403 04-1722]

7/9/04 Amicus curiae brief filed by Amicus Supporting Appellee Secretary of Labor in 04-1336 Copies of brief: 8 # br pages: 27 Sufficient[Y/N]?: Y. N. Method of filing w/court: CD Date of Service on parties: 7/9/04 Type of service on parties: PM [04-1336] ~ [4014558] (aweb) [04-1336]

7/26/04 Appearance form filed by Salvador P. Simao for Amicus Supporting Appellee Secretary of Labor in 04-1336. [04-1336] (aweb) [04-1336]

8/6/04 Cross-brief filed by Appellee Mid Atlantic Med LLC in 04-1336, Appellant Mid Atlantic Med LLC in 04-1403, Appellee Mid Atlantic Med LLC in 04-1722. Copies of brief: 8 # brf pages: 142. Sufficient[Y/N]?: N – improper addendum material. SEALED[Y/N]?: N. Method of filing w/ court: CD Date of Service on parties: 8/6/04

Type of service on parties: PM Appellant cross-reply brief due 9/8/04 for Joel Sereboff in 04-1336, for Marlene Sereboff in 04-1336, for Joel Sereboff in 04-1403, for Marlene Sereboff in 04-1403, for Joel Sereboff in 04-1722, for Marlene Sereboff in 04-1722 . [04-1336, 04-1403, 04-1722] ~ [4031673] (aweb) [04-1336 04-1403 04-1722]

8/9/04 Motion filed by Appellee Mid Atlantic Medical in 04-1336, Appellant Mid Atlantic Medical in 04-1403, Appellee Mid Atlantic Medical in 04-1722 to amend caption [4031651-1]. [04-1336, 04-1403, 04-1722] ~ [4031651] (aweb) [04-1336 04-1403 04-1722]

8/10/04 ORDER FILED [4031654] granting motion to amend/amending caption [4031651-1] in 04-1336, 04-1403, 04-1722 Copies to all parties. [04-1336, 04-1403, 04-1722] ~ [4031654] (aweb) [04-1336 04-1403 04-1722]

8/10/04 Notice non-compliant brief filed by Appellee Mid Atlantic Med LLC in 04-1336, Appellant Mid Atlantic Med LLC in 04-1403, Appellee Mid Atlantic Med LLC in 04-1722. Why?: Improper addendum material . FORMAT. [04-1336, 04-1403, 04-1722] ~ [4031675] Sufficient brief due on 8/20/04 for Mid Atlantic Med LLC in 04-1336, for Mid Atlantic Med LLC in 04-1403, for Mid Atlantic Med LLC in 04-1722 (aweb) [04-1336 04-1403 04-1722]

8/18/04 Motion filed by Appellee Mid Atlantic Med LLC in 04-1336, Appellant Mid Atlantic Med LLC in

04-1403, Appellee Mid Atlantic Med LLC in 04-1722 to file brief in its present form [4036277-1]. [04-1336, 04-1403, 04-1722] ~ [4036277] (mst) [04-1336 04-1403 04-1722]

8/18/04 ORDER FILED [4036638] granting motion to file brief as is [4036277-1] in 04-1336, 04-1403, 04-1722 Copies to all parties. [04-1336, 04-1403, 04-1722] ~ [4036638] (mst) [04-1336 04-1403 04-1722]

8/18/04 Brief made sufficient by Appellee Mid Atlantic Med LLC in 04-1336, Appellant Mid Atlantic Med LLC in 04-1403, Appellee Mid Atlantic Med LLC in 04-1722 per order filed 8/18/04. [04-1336, 04-1403, 04-1722] ~ [4036658] (mst) [04-1336 04-1403 04-1722]

8/18/04 Response/answer filed [4036753-1] by Appellant Marlene Sereboff in 04-1336, Appellant Joel Sereboff in 04-1336, Appellee Marlene Sereboff in 04-1403, Appellee Joel Sereboff in 04-1403, Appellant Marlene Sereboff in 04-1722, Appellant Joel Sereboff in 04-1722 to motion to file brief as is [4036277-1] in 04-1722, 04-1403, 04-1722 [04-1336, 04-1403, 04-1722] ~ [4036753] (aweb) [04-1336 04-1403 04-1722]

8/18/04 Motion filed by Appellant Marlene Sereboff in 04-1336, Appellant Joel Sereboff in 04-1336, Appellee Marlene Sereboff in 04-1403, Appellee Joel Sereboff in 04-1403, Appellant Marlene Sereboff in 04-1722, Appellant Joel Sereboff in 04-1722 to extend time to file appellant(s) cross-reply brief until 9/1/04 [4036755-1]. [04-1336, 04-1403, 04-1722] ~ [4036755] (aweb) [04-1336 04-1403 04-1722]

8/19/04 Informal action taken mooting motion to ext time to f A's xrpl br [4036755-1] in 04-1336, 04-1403,

04-1722 [04-1336, 04-1403, 04-1722] ~
[4036758] (aweb) [04-1336 04-1403 04-1722]

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9/8/04 Cross-reply brief filed by Appellant Marlene Sereboff in 04-1336, Appellant Joel Sereboff in 04-1336, Appellee Marlene Sereboff in 04-1403, Appellee Joel Sereboff in 04-1403, Appellant Marlene Sereboff in 04-1722, Appellant Joel Sereboff in 04-1722. Copies of brief: 8 # brf pages: 32 Sufficient[Y/N]?: N. SEALED[Y/N]?: N. Method of filing w/ court: HD Date of Service on parties: 9/8/04 Type of service on parties: PM [04-1336, 04-1403, 04-1722] ~ [4047521] (aweb) [04-1336 04-1403 04-1722]

9/9/04 Notice non-compliant brief filed by Appellant Marlene Sereboff in 04-1336, Appellant Joel Sereboff in 04-1336, Appellee Marlene Sereboff in 04-1403, Appellee Joel Sereboff in 04-1403, Appellant Marlene Sereboff in 04-1722, Appellant Joel Sereboff in 04-1722. Why?: No Summary of Argument Cover should be red. FORMAT. [04-1336, 04-1403, 04-1722] ~ [4047526] Sufficient brief due on 9/20/04 for Joel Sereboff in 04-1336, for Marlene Sereboff in 04-1336, for Joel Sereboff in 04-1403, for Marlene Sereboff in 04-1403, for Joel Sereboff in 04-1722, for Marlene Sereboff in 04-1722 (aweb) [04-1336 04-1403 04-1722]

9/20/04 Brief made sufficient by Appellant Marlene Sereboff in 04-1336, Appellant Joel Sereboff in 04-1336, Appellee Marlene Sereboff in 04-1403,

Appellee Joel Sereboff in 04-1403, Appellant Marlene Sereboff in 04-1722, Appellant Joel Sereboff in 04-1722. Number of brf pages: 45. [04-1336, 04-1403, 04-1722] ~ [4054481](aweb) [04-1336 04-1403 04-1722]

9/24/04 Case tentatively calendared for oral argument Term: November 30 - December 3, 2004 Place: Richmond. NOTIFY OF CONFLICT BY: October 1, 2004. [04-1131, 04-1200, 04-1132, 04-1137, 04-1157, 04-1168, 04-1191, 04-1205, 04-1257, 04-1262, 04-1271, 04-1472, 04-1277, 04-1314, 04-1328, 04-1336, 04-1403, 04-1722, 04-1338, 04-1342, 04-1344, 04-1357, 04-1371, 04-1376, 04-1378, 04-1391, 04-1395, 04-1729, 04-1405, 04-1411, 04-1408, 04-1439, 04-1441, 04-1459, 04-1469, 04-1471, 04-1476, 04-1480, 04-1502, 04-1520, 04-1535, 04-1559, 04-1562, 04-1697, 04-1576, 04-1586, 04-1616, 04-1642, 04-1758, 04-1643, 04-1646, 04-1652, 04-1687, 04-1708, 04-1710, 04-1753, 04-1818, 04-4001, 04-4112, 04-4227, 04-4230, 04-4250, 04-4260, 04-4311, 04-4320, 04-4353, 04-4367, 04-6130, 04-6473, 04-6481, 04-6500, 04-6531, 04-6607] ~ [4057296] (jlc) [04-1131 04-1132 04-1137 04-1157 04-1168 04-1191 04-1200 04-1205 04-1257 04-1262 04-1271 04-1277 04-1314 04-1328 04-1336 04-1338 04-1342 04-1344 04-1357 04-1371 04-1376 04-1378 04-1391 04-1395 04-1403 04-1405 04-1408 04-1411 04-1439 04-1441 04-1459 04-1469 04-1471 04-1472 04-1476 04-1480 04-1502 04-1520 04-1535 04-1559 04-1562 04-1576 04-1586 04-1616 04-1642 04-1643 04-1646 04-1652 04-1687

04-1697 04-1708 04-1710 04-1722 04-1729 04-1753 04-1758 04-1818 04-4001 04-4112 04-4227 04-4230 04-4250 04-4260

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04-4311 04-4320 04-4353 04-4367 04-6130 04-6473 04-6481 04-6500 04-6531 04-6607]

9/27/04 Cross-reply brief filed by Appellee Mid Atlantic Med LLC in 04-1336, Appellant Mid Atlantic Med LLC in 04-1403, Appellee Mid Atlantic Med LLC in 04-1722. Copies of brief: 8 # brf pages: 18. Sufficient [Y/N]: Y. SEALED?[Y/N]: N. Method of filing w/ court: CD Date of Service on parties: 9/27/04 Type of service on parties: CD [04-1336, 04-1403, 04-1722] ~ [4059675] (aweb) [04-1336 04-1403 04-1722]

10/15/04 Case calendared for oral argument. Case calendared for oral argument on: 12/1/04. [04-1336, 04-1403, 04-1722] ~ [4069268] (jc) [04-1336 04-1403 04-1722]

11/8/04 Motion filed by Amicus Supporting Appellee Secretary of Labor in 04-1336 to participate in oral argument [4083358-1]. ~ [4083358] [04-1336] (aweb) [04-1336]

11/8/04 Response/answer requested to motion to participate in oral arg [4083358-1] Response/answer due 11/18/04 for Mid Atlantic Med LLC, for Joel Sereboff, for Marlene

Sereboff. [04-1336] ~ [4083654] (aweb) [04-1336]

11/16/04 Response/answer filed [4087650-1] by Appellee Mid Atlantic Med LLC in 04-1336, Appellant Mid Atlantic Med LLC in 04-1403, Appellee Mid Atlantic Med LLC in 04-1722 to motion to participate in oral arg [4083358-1] in 04-1722 [04-1336, 04-1403, 04-1722] ~ [4087650] (dhb) [04-1336 04-1403 04-1722]

11/17/04 Response/answer filed [4089082-1] by Appellant Marlene Sereboff in 04-1336, Appellant Joel Sereboff in 04-1336, Appellee Marlene Sereboff in 04-1403, Appellee Joel Sereboff in 04-1403, Appellant Marlene Sereboff in 04-1722, Appellant Joel Sereboff in 04-1722 to motion to participate in oral arg [4083358-1] in 04-1722 [04-1336, 04-1403, 04-1722] ~ [4089082] (mst) [04-1336 04-1403 04-1722]

11/23/04 COURT ORDER filed [4091951] granting Secretary of Labor's motion to participate in oral argument for 7 minutes on time ceded by appellee/cross-appellant [4083358-1] in 04-1336 Copies to all parties. [4091951] [04-1336, 04-1403, 04-1722] (aweb) [04-1336 04-1403 04-1722]

11/30/04 Calendar update. Argument date: 12/2/04. [04-1336, 04-1403, 04-1722] (jc) [04-1336 04-1403 04-1722]

11/30/04 COURT ORDER filed [4094669] to reschedule oral argument for 12/2/04 [4094669-1]. Copies to all parties. ~ [4094669] [04-1336, 04-1403, 04-1722] (aweb) [04-1336 04-1403 04-1722]

12/2/04 Oral argument heard. Panel: Honorable H. E. Widener, Honorable Robert B. King, Honorable

Henry F. Floyd. Courtroom Deputy: JLC, Jr..
[04-1336, 04-1403, 04-1722] (jc)

04-1336 Mid Atlantic Medical, et al v. Sereboff, et al

[04-1336 04-1403 04-1722]

12/30/04 Supplemental authorities (FRAP 28(j)) filed by Appellee Mid Atlantic Med LLC in 04-1336, Appellant Mid Atlantic Med LLC in 04-1403, Appellee Mid Atlantic Med LLC in 04-1722 [4109651-1] [04-1336, 04-1403, 04-1722] (aweb) [04-1336 04-1403 04-1722]

1/13/05 Supplemental authorities (FRAP 28(j)) filed by Appellant Marlene Sereboff in 04-1336, Appellant Joel Sereboff in 04-1336, Appellee Marlene Sereboff in 04-1403, Appellee Joel Sereboff in 04-1403, Appellant Marlene Sereboff in 04-1722, Appellant Joel Sereboff in 04-1722 [4116705-1] [04-1336, 04-1403, 04-1722] (aweb) [04-1336 04-1403 04-1722]

4/26/05 Supplemental authorities (FRAP 28(j)) filed by Appellant Marlene Sereboff in 04-1336, Appellant Joel Sereboff in 04-1336, Appellee Marlene Sereboff in 04-1403, Appellee Joel Sereboff in 04-1403, Appellant Marlene Sereboff in 04-1722, Appellant Joel Sereboff in 04-1722 [4175652-1] [04-1336, 04-1403, 04-1722] (aweb) [04-1336 04-1403 04-1722]

5/4/05 Published, authored opinion filed. Copies to all parties. [04-1336, 04-1403, 04-1722] (aweb) [04-1336 04-1403 04-1722]

5/4/05	Judgment order filed. Decision: Affirmed in part, Vacated in part, and remanded. EOD Date: 5/4/05. ~ [4180375] [04-1336, 04-1403, 04-1722] (aweb) [04-1336 04-1403 04-1722]
5/17/05	Petition filed by Appellant Marlene Sereboff in 04-1336, Appellant Joel Sereboff in 04-1336, Appellee Marlene Sereboff in 04-1403, Appellee Joel Sereboff in 04-1403, Appellant Marlene Sereboff in 04-1722, Appellant Joel Sereboff in 04-1722 for rehearing. Number copies filed: 20 [4187387-1]., for rehearing en banc. Number of copies filed: 20 [4187387-2] ~ [4187387] [04-1336, 04-1403, 04-1722] (aweb) [04-1336 04-1403 04-1722]
5/18/05	Bill of costs filed by Mid Atlantic. [4188469-1] [04-1336, 04-1403, 04-1722] (aweb) [04-1336 04-1403 04-1722]
6/1/05	COURT ORDER filed [4194688] denying motion for rehearing [4187387-1] EOD Date: 6/1/05. in 04-1336, 04-1403, 04-1722, denying motion for rehearing en banc [4187387-2] EOD Date: 6/1/05. in 04-1336, 04-1403, 04-1722 Copies to all parties. ~ [4194688] [04-1336, 04-1403, 04-1722] (aweb) [04-1336 04-1403 04-1722]
6/9/05	ORDER filed awarding costs in the amount of $329.50 to Mid-Atlantic. [04-1336, 04-1403, 04-1722] ~ [4199545] (aweb) [04-1336 04-1403 04-1722]
6/9/05	Mandate issued. ~ [4199551] [04-1336, 04-1403, 04-1722] (aweb) [04-1336 04-1403 04-1722]

9/1/05	Supreme Court notice that petition for certiorari was filed on 08/25/05. Spct No.: 05-260 Spct Pty 1: Joel Sereboff, et ux Spct Pty 2: Mid Atlantic Medical Services. [04-1336, 04-1403, 04-1722] ~ [4247126] (dhb) [04-1336 04-1403 04-1722]
12/2/05	Supreme Court order received granting petition certiorari [4247126-1] on 11/28/05. in 04-1336, petition certiorari [4247126-1] on 11/28/05. in 04-1403, petition certiorari [4247126-1] on 11/28/05. in 04-1722 [04-1336, 04-1403, 04-1722] ~ [4301392] (jhm) [04-1336 04-1403 04-1722]
1/10/06	A's and 2 E's, Amicus and Reply Briefs released to Lantagne for copies. [04-1403, 04-1722] for copies . [04-1336, 04-1403, 04-1722] (ad) [04-1336 04-1403 04-1722]
1/11/06	E's cross reply brief released to Lantagne for copying . [04-1336, 04-1403, 04-1722] (rba) [04-1336 04-1403 04-1722]

FILED
U.S. DISTRICT COURT
DISTRICT OF MARYLAND
2003 AUG – 5 P 1:05

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

MID ATLANTIC MEDICAL SERVICES, INC.,	
Plaintiff	
v.	
JOEL SEREBOFF, MARLENE SEREBOFF, JOHN STEIN AND THE BOCCARDO LAW FIRM, LLP,	03CV2269 Case No.
Defendants	

VERIFIED COMPLAINT

Plaintiff, Mid Atlantic Medical Services, Inc. ("Plaintiff"), pleads as follows:

1. This action is to enforce the terms of the MAMSI Life and Health Insurance PPO Plan (the "Plan") and for equitable relief arising under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, et seq.

PARTIES

2. Plaintiff is a fiduciary of the Plan, which is sponsored by Katzen Eye Group, and, as such, is entitled to bring this action pursuant to 29 U.S.C. § 1132(a)(3).

3. Upon information and belief, Defendant Joel Sereboff is a citizen and resident of Baltimore County, Maryland. Defendant Sereboff's address is 2215 Millridge Road, Owings Mills, Maryland 21117.

4. Upon information and belief, Defendant Marlene Sereboff is a citizen and resident of Baltimore County, Maryland. Defendant Joel Sereboff's address is 2215 Millridge Road, Owings Mills, Maryland 21117.

5. Upon information and belieft Defendant John Stein is a citizen and resident of Santa Clara County, California and a member of The Boccardo Law Firm, LLP. Defendant Stein's address is 111 West St. John Street, Eleventh Floor, San Jose, California 95115-0001

6. Upon information and belief, Defendant The Boccardo Law Firm, LLP ("Boccardo Law Firm") is a business in Santa Clara County, California with its principal place of business being 111 West St. John Street, Eleventh Floor, San Jose, California 95115-0001

JURISDICTION AND VENUE

7. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 because this action is to enforce provisions of the Plan arising under ERISA. The Court has jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367.

8. Pursuant to 29 U.S.C. § 1132(e)(2), venue is proper in this Court because the plan is administered in this

district and, alternatively, violation of the Plan's terms is occurring in this district,

FACTUAL ALLEGATIONS

9. Defendants Joel Sereboff and Marlene Sereboff (the "Sereboffs") are "Covered Persons" under the Plan.

10. The Sereboffs were injured in a personal injury accident on June 22, 2000, and sought to recover from the parties who caused those injuries.

11. In connection with the injuries suffered by Defendant Marlene Sereboff, the Plan paid medical benefits on her behalf in the amount of $73,778.26.

12. In connection with the injuries suffered by Defendant Joel Sereboff, the Plan paid medical benefits on his behalf in the amount of $1.091.11

13. The Plan contains an acts of third parties provision, which states:

> ACTS OF THIRD PARTIES
>
> This subrogation provision applies when you are sick or injured as a result of the act or omission of another person or party .
>
> Subrogation means the Company's right to recover any payments made to you or your dependent by a third party or any insurer acting in place of, or on behalf of a third party or a third party's insurer. because of an injury or illness caused by a third party. Third party means another person or organization.
>
> If you or your dependent receives benefits and have a right to recover damages from a

> third party, the Company is subrogated to this right. All recoveries from a third party (whether by lawsuit, settlement, or otherwise) must be used to reimburse the Company net of reasonable attorney fees and court costs prorated to reflect that portion of the total recovery which is due the Company for benefits paid. Any remainder will be yours or your dependents. The Company's share of the recovery will not be reduced because you or your dependent has not received the full damages claimed, unless the Company agrees in writing to a reduction.
>
> You must promptly advise the Company whenever a claim is made against a third party with respect to any loss for which the Company benefits have been or will be paid. You or your dependent must execute any assignments, liens or other documents and provide information as the Company requests. MLH's benefits may be withheld until documents or information are received. If you need more information about subrogation, the Company will provide you with its subrogation procedures.

14. Upon information and belief, the Sereboffs settled claims relating to the June 22, 2000, accident in February, 2003, for an amount in excess of the Plan's reimbursement interest.

15. Plaintiff has requested that Defendant Marlene Sereboff reimburse the Plaintiff in the amount of

$73, 778.26 pursuant to the terms of the Plan, but she has refused to do so.

16. Plaintiff has requested that Defendant Joel Sereboff reimburse the Plaintiff in the amount of$1,O91.11 pursuant to the terms of the Plan, but he has refused to do so.

17. Defendants Stein and his firm, Boccardo Law Firm, are being named as Defendant stakeholders since these Defendants, on information and belief, represented the Sereboffs and disbursed a portion of the settlement funds to themselves and the Sereboffs despite notice from Plaintiff of its reimbursement interest in the amount of $74,869.37 from settlement funds obtained on behalf of the Sereboffs relating to their June 22, 2000, injuries. To the extent the funds have been dissipated, Plaintiff brings state law tort claims against Defendants Stein and Boccardo Law Firm.

18. Upon information and belief, some of these disbursed funds may have been dissipated by the Sereboffs.

The disbursement by Defendants Stein and Boccardo Law Firm has put the disputed funds at immjnent risk of being placed beyond the Court's ERISA jurisdiction.

I. TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

20. Pursuant to Fed. R. Civ. P. 65, Plaintiff is entitled to a temporary restraining order and, upon notice and hearing, Plaintiff is entitled to a preliminary injunction enjoining Defendants, and all those acting in concert or participating with them from disposing of the settlement funds, or whatever portion of those funds have not been dissipated pending a final determination by this Court. If Defendants are able to place these monies beyond the reach

of Court, then they may deprive the Court of the ability to impose an equitable remedy under ERISA

II. ENFORCEMENT OF THE TERMS OF THE PLAN

Pursuant to 29 U.S.C. § 1132(&)(3), Plaintiff seeks equitable relief, including, but not limited to, restitution, imposition of a constructive trust, and declaration of rights under the Plan against Defendants to enforce ERISA and the terms of the Plan

22 By refusing to cooperate with the Plan to protect its rights and refusing to reimburse the Plan to the extent of benefits paid on behalf of the Sereboffs out of the amount the Sereboffs recovered, Defendants have violated the terms of the Plan.

Since these acts and/or practices violate the Plan's terms, this Court should enter an order declaring the Plan's rights to the disputed funds and enter an order in restitution enforcing the terms of the Plan by requiring Defendants to turn over the $74,869.37 to the Plan.

III. TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

The Plaintiff had a contractual relationship with the Sereboffs. Defendants Stein and Boccardo Law Firm willfully and intentionally interfered with the Plaintiffs contractual relations with the Sereboffs.

25. Defendants Stein and Boccardo Law Firm's conduct in negotiating the settlement check and in failing to reimburse the Plan, despite having knowledge of Plaintiffs claim, was a proximate cause of the Plan's damages.

26. The Plan has been damaged in the amount of $74,869.37 because of Defendants Stein and Boccardo Law Firm's conduct.

IV. CONVERSION

27. Defendants Stein and Boccardo Law Firm received the settlement payment for the Sereboffs. Defendants Stein and Boccardo Law Firm intentionally and wrongfully asserted dominion and control over the settlement payment, inconsistent with the Plan's ownership over the settlement payment.

Defendants Stein and Boccardo Law Firm failed to preserve the sufficient amount of funds from the settlement proceeds to satisfy the Plan's lien and reimbursement interest of $74,869.37.

V. PRAYER FOR RELIEF

Plaintiff requests that the Court enter an order granting a declaratory judgment, injunction, specific performance, constructive trust, and restitution against Defendants, requiring Defendants to turn over $74,869.37 including appropriate pre-judgment and post-judgment interest, and for any other relief to which the Plan is entitled, including that the Plan be awarded reasonable attorneys' fees and costs pursuant to 29 U.S.C. § 1132(g). To the extent the funds have been dissipated, Plaintiff seeks judgment against Defendants Stein and The Boccardo Law Firm, LLP in that amount and for punitive damages in an amount to be determined at trial.

Date: August 5, 2003.

By: _____/s/_____

[Local Counsel] Michelle Stawinski (Bar No. 15126)
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201 N. Charles Street, suite 2400
Baltimore, Maryland 21201-4108
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Telephone: (901) 844-4439
Facsimile: (901) 844-4435

* Application for *Pro Hac Vice* to be filed.

VERIFICATION

I, Barry Dumser, a competent person of the full age of majority, declare:

I am employed by Mid Atlantic Medical Services, Inc., which is a fiduciary of the Plan with respect to the Plan's right of recovery for the MAMSI Life and Health Insurance PPO Plan (the "Plan"), sponsored by Katzen Eye Group. I have personal knowledge of the facts set forth in the Verified Complaint, and if called as a witness in this matter, I could and would testify competently to those facts under oath.

I declare under penalty of perjury that the foregoing is true and correct.

Date: 8/4/03 __/s/_____

Barry Dumser

FILED
U.S. DISTRICT COURT
DISTRICT OF MARYLAND
2003 AUG – 5 P 1:06

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

MID ATLANTIC MEDICAL SERVICES, INC., Plaintiff v. JOEL SEREBOFF, MARLENE SEREBOFF, JOHN STEIN AND THE BOCCARDO LAW FIRM, LLP, Defendants	Case No. AMD03CV2269

PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65, Plaintiff, Mid Atlantic Medical Services, Inc. ("Plaintiff"), moves the Court to issue a Temporary Restraining Order and a

Preliminary Injunction against Defendants Joel Sereboff and Marlene Sereboff, John Stein, and The Boccardo Law Firm, LLP ("Defendants") enjoining them from disposing of proceeds recovered as a result of the Sereboffs' June 22, 2000, accident in an amount in excess of the Plaintiffs reimbursement interest, $74,869.37. Plaintiff is also entitled to a statutory injunction under 29 U.S.C. § 1132(a)(3)(A). Plaintiff requests that, after notice and a hearing on this matter, this Court issue a preliminary injunction enjoining Defendants from dissipating the disputed funds.

Pursuant to the terms of the ERISA-covered Plan, Plaintiff is entitled to full reimbursement. While the Plan permits a "common fund" reduction for attorney reimbursement fees, the common fund doctrine is inapplicable where, as here, the Sereboffs' attorney has attempted to take the fund from Plaintiff. This Court should enter an order requiring Defendants to preserve, to the extent of Plaintiff's claim, any portions of the settlement funds remaining in bank accounts controlled by any of the Defendants until a final determination is entered by this Court. Plaintiff requests that the Court grant Plaintiff's Motion for a Temporary Restraining Order and, upon notice and a hearing, a Preliminary Injunction. A memorandum of law has been filed contemporaneously with this motion.

Date: August 5, 2003.

Respectfully submitted,

By:___/S/_____

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FILED
U.S. DISTRICT COURT
DISTRICT OF MARYLAND
2003 AUG – 5 P 1:06

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

MID ATLANTIC MEDICAL SERVICES, INC.,	
Plaintiff	
v.	
JOEL SEREBOFF, MARLENE SEREBOFF, JOHN STEIN AND THE BOCCARDO LAW FIRM, LLP,	03CV2269 Case No.
Defendants	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiff submits this memorandum in support of its motion for a temporary restraining order and, upon notice and hearing, a preliminary injunction.

INTRODUCTION

Defendants Marlene Sereboff and Joel Sereboff (the "Sereboff"s") are "Covered Persons" under the terms of the MAMSI Life and Health Insurance PPO Plan (the "Plan' *See* Verified Complaint, ¶ 9. The Plan is covered by the Employee Retirement Income Security Act of 1974,29 U.S.C. § 1001, etseq. ("ERISA"). Id. at ¶ 1 The Plan paid $73.778.26 in medical benefits on behalf of Defendant Marlene Sereboff because of injuries she sustained in a personal injury accident on June 22, 2000. Id. at ¶¶ 10, 11. The Plan paid $1,091.11 in medical benefits on behalf of Defendant Joel Sereboff because of injuries he sustained in the same personal injury accident on June 22, 2000. Id. at ¶¶ 10, 12. The Sereboffs have settled their claims with the parties responsible for their injuries. Id. at ¶ 14. Defendants Stein and the Boccardo Law Firm are being named as Defendant stakeholders since these Defendants disbursed some or all of the settlement funds to the Sereboffs. Id. at ¶¶ 17,18 The Plan contains an acts of third parties provision, which requires the Sereboffs to reimburse the Plan, to the extent of medical benefits paid, when they make a recovery from other parties. Id. at ¶ 13. While the Plan here provides that its reimbursement rights may be reduced by reasonable attorney's fees, the terms of the Plan also require that the Sereboffs cooperate with efforts to recover benefits paid by the Plan on their behalf. *Id.* Plaintiff has requested that Defendants abide by the terms of the Plan, but they have refused to do so. Id at ¶ 15 - 17. The disbursement by Defendant Stein and his firm has put the disputed funds at imminent risk of being placed beyond the Court's ERISA jurisdiction. Id. at ¶ 18.

Under Fed. R. Civ. P. 65, Plaintiff seeks a temporary restraining order and a preliminary injunction against Defendants, and all those in concert or participation

with them, requiring them to preserve the disputed funds, which will maintain the status quo until this Court can determine the rights and obligations of the parties, and will prevent Defendants from placing the disputed funds beyond the reach of the Court, thereby potentially preventing imposition of an equitable remedy, which is the only type of remedy available to Plaintiff under ERISA. See 29 U.S.C. § 1132(a)(3); *Great-West Life & Annuity Ins. Co. v. Knudson*, 122 S. Ct. 708 (2002).

Plaintiff has a substantial likelihood of success on the merits. Pursuant to the terms of the Plan and the Supreme Court's decision in *Knudson*, Plaintiff is entitled to full reimbursement from the Defendants to the extent of benefits paid by the Plan. While the Plan permits a reduction for attorney fees, in situations such as the one presented here, members are required to reimburse the plan in full when they fail to comply with the Plan provision.

Further, Plaintiff will suffer irreparable harm without issuance of a restraining order and, upon notice and hearing, a preliminary injunction if Defendants are able to waste and deplete the funds before this Court can impose a final equitable remedy under 29 U.S.C. § 1132(a)(3). An order enjoining Defendants from dissipating of the settlement funds is therefore necessary and appropriate.

ARGUMENTS AND AUTHORITIES

I. This Court has subject matter jurisdiction under ERISA because the Supreme Court has held that this Court may order restitution in the form of a constructive trust or equitable lien in ERISA reimbursement actions.

This Court has subject matter jurisdiction under ERISA because the Supreme Court, in *Knudson*, held that

federal courts may order restitution in the form of a constructive trust or equitable lien where monies are identifiable and in a defendant's possession. On January 8, 2002, the Supreme Court decided *Knudson*, and held that an ERISA .covered plan may enforce a reimbursement provision where, as here, the monies are identifiable and in a defendant's possession. In that case, Plaintiff Great- West had asked the Supreme Court to recognize the rights of ERISA plans and their fiduciaries to file suit in federal court to enforce reimbursement provisions, which the Court did, so long as the monies over which the plan fiduciary seeks restitution or constructive trust are being held by the defendant in the federal court lawsuit:

> In contrast, plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. [citations omitted]. A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where "the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiffs] claim is only that of a general creditor," and the plaintiff "cannot enforce a constructive trust or an equitable lien upon other property of the [defendant]." Restatement of Restitution, *supra*, 215, Comment *a*, at 867. Thus for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the possession particular funds or property in the defendant's possession.

Knudson, 122 S. Ct. at 714.

The federal courts addressing ERISA reimbursement claims since *Knudson*, including the Fourth Circuit,[1] have ruled that constructive trusts or equitable liens are appropriate equitable relief under ERISA under these circumstances. In *Administrative Committee v. Varco*, 2003 U.S. App. LEXIS 14992 (7th Cir. July 29, 2003),[2] once the plaintiff learned that the defendants were attempting to abscond with the $100,000.00 in settlement proceeds, plaintiff promptly sought and obtainedemergency relief from that court.

With respect to Varco's contention that *Knudson* foreclosed the Court's authority to order equitable relief, the *Varco* court, relying upon the quote from *Knudson* cited above, stated that "Thus, under *Great-West Life*, the reimbursement action by the Committee in this unique case is equitable because the funds the Committee seeks to recover are identifiable, are in the control of a defendant, and the Committee is rightfully entitled to the monies under the terms of the Plan. Because those elements are met here, the Committee's claim is equitable under § 502(a)(3)(B) of ERISA, and the district court properly exercised federal question subject matter jurisdiction under 28 U.S.C. § 1331." *Varco*, at *16.

Similarly, in *In Re Carpenter*, No. 00-2348, 2002 U.S. App. LEXIS 10615 (4th Cir. June 3, 2002) (copy attached hereto as Exhibit A). the Court allowed equitable relief under *Knudson* where a defendant had control of identifiable funds.

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[1] *In re Carpenter*, No. 00-2348, 2002 U.S. App. Lexis 10615 (4th Cir. June 3, 2002) (copy attached hereto as Exhibit A).

[2] A copy of the *Varco* decision is attached hereto as Exhibit B.

[3] See Temporary Restraining Order, dated December 14, 2001, and Preliminary Injunction, dated December 21, 2001, Collective Exhibit C hereto.

Also, in *Great-West Life & Annuity Ins. Co. v. Brown*, 192 F. Supp. 2d 1376 (M.D. Ga. 2002), the court distinguished Knudson and held that disputed funds were identifiable and traceable where the covered person's attorney was holding funds.

Likewise, in *Bauer v. Gylten*, 2002 U.S. Dist. LEXIS 7246 (D.N.D. Apr. 22, 2002), the federal court ruled that an ERISA plan fiduciary could pursue a reimbursement claim in the form of a constructive trust where the funds are identifiable. A copy of this decision is attached hereto as Exhibit D.

Indeed, since *Knudson*, federal courts throughout the United States have been routinely granting extraordinary relief to prevent the dissipation of funds under these circumstances. *See* Collective Exhibit E hereto for copies of decisions from this Court and other federal courts granting motions for temporary restraining orders and preliminary injunctions in ERISA reimbursement actions.

This Court should issue a temporary restraining order and, upon notice and a hearing, a preliminary injunction against Defendants to prevent them from dissipating any of the disputed funds that remain in their possession that are identifiable and traceable to the settlement proceeds recovered as a result of their injuries.

II. Defendants should be enjoined from disposing of the settlement funds until the rights of Plaintiff have been determined by this Court.

A. Plaintiff is not required to establish the traditional elements for ordering preliminary relief because injunctive relief to enforce the Plan terms is specifically authorized by 29 U.S.C. § 1132(a)(3)(A).

29 U.S.C. § 1132(a)(3)(A) provides that

> (b) Persons empowered to bring a civil action. A civil action may be brought-
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan. . . .

29 U.S.C. § 1132(a)(3)(A).

Therefore, because ERISA's civil enforcement provision expressly provides participants, beneficiaries, and fiduciaries, with the power to obtain an injunction, Plaintiff is not required to establish the traditional elements for obtaining preliminary relief in order to obtain such preliminary relief.[4]

Here, 29 U.S.C. § 1132(a)(3)(A) specifically authorizes suit by a participant, beneficiary. or fiduciary "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan.." *See* 29 U.S.C. § 1132(a)(3)(A). Plaintiff's Verified Complaint establishes that the Sereboffs are violating the terms of the Plan.

B. Alternatively, Plaintiff has established the standard requirements for obtaining preliminary relief.

A Court deciding whether to grant a preliminary injunction must consider the following four factors: (1) a likelihood of irreparable harm to Plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to Defendant if the requested relief is granted; (3) the

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[4] See also *Trailer Train Co. v. State Board of Equalization*, 697 F.2d 860 (9th Cir. 1983); *Atchison, Topeka and Santa Fe Railway v. Lennen*, 640 F.2d 255, 259-61 (10th Cir. 1981); *United States v. City and County of San Francisco*, 310 U.S. 16, 30-31 (1940).

likelihood that Plaintiff will succeed on the merits, and (4) the public interest.[5] As set forth below, Plaintiff has satisfied the requirements for the issuance of a preliminary injunction.

1. Plaintiff has a strong likelihood of success on the merits of its claims.

Section 502(a)(3) of ERISA provides that a civil action may be brought by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this sub-chapter or terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress its violations or (ii) to enforce any provisions of this sub-chapter of the terms of the plan. See 29 U.S.C. § 1132(a)(3). Thus, section 502 (a) (3) (B) authorizes the Plan to bring actions to enforce plan terms and to redress violations of ERISA and the terms of the Plan. 29 U.S.C. § 1132(a)(3)(B).[6]

As with other substantive provisions of a plan, reimbursement duties are created, determined and resolved by reference to the written plan.[7] The Plan and the Sereboffs must abide by the Plan's provisions. By accepting benefits under the Plan, the participants agree to abide by

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[5] *Scotts Co. v. United Industries Corp.*, 315 F.3d 264, 271 (4th Cir. 2002).

[6] See Blue Cross & Blue Shield of Alabama v. Sanders, 138 F.3d 1347 (11th Cir. 1998).

[7] ERISA preempts state laws that directly or indirectly relate to self-funded employee benefit plans. *See, e.g., FMC Corp. v. Holliday*, 498 U.S. 52 (1990); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).

all its provisions.[8] Binding participants to all provisions of the Plan instead of allowing them to "pick and choose" among its provisions - is only fair and necessary. Otherwise, deductibles and co-payments could be ignored and participants could decide what eligible expenses were under the Plan.

The Plan initially pays benefits so that there is no loss to the participant. Through enforcement of that clause, the third party pays for the injuries he or she caused. The Plan's assets are then recovered by it for future claims. Thus, the Plan discharges one of its most fundamental fiduciary obligations, ensuring that Plan assets are protected so that future claims may be paid, thereby protecting all of the Plan's participants and beneficiaries.

Here, the Plan's acts of third parties provision provides for full reimbursement, to the extent of benefits paid, in situations such as the one presented here where a participant is injured by another party, medical expenses are paid by the Plan because of those injuries, the participant makes another recovery because of those injuries, and the participant fails to abide by the Plan terms. See Verified Complaint, ¶ 13. While the Plan permits a reduction for attorney's fees, both the terms of the Plan and common law contemplate that such a reduction is only appropriate where the Plan does not have to retain counsel to protect its reimbursement interest and members abide by the Plan terms.

The U.S. Supreme Court in *Hobbs v. McLean*, 117 U.S. 567 (1886) articulated the maximum that such a fee reduction in not appropriate in situations such as the one

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[8] *Kolentus v. Avco Corp.*, 798 F .2d 949, 956 (7th Cir. 1986); *see also Gladden v. Pargas, Inc. ofWaldorf, Md.*, 575 F.2d 1091, 1093 (4th Cir. 1978); *Jacobs v. Pickands Mather& Co.*, 933 F.2d 652,656 (8th Cir. 1991).

presented here in which Defendants have obstructed the Plan's rights: "[we] see no reason why [plaintiff] should pay defendant, who, instead of aiding [plaintiff] in securing [its] rights, has been an obstacle and obstruction to their enforcement. The services for which defendant seeks pay from the [plaintiff] were not rendered in [its] behalf, but in hostility to [its] interest." *Id.* at 581.[9]

The Court will likely rule, therefore, that the Plan is entitled to 100% reimbursement because Defendants have failed to comply with the Plan provision by failing to reimburse Plaintiff according to the terms of the Plan.

Plaintiff has a likelihood of success on the merits of its claims. In all likelihood, based upon the terms of the Plan, the Court will order Defendants, and those acting in concert or participation with them, to abide by the terms of the Plan and to turn over the $74, 869.37 to Plaintiff from proceeds received from the Sereboffs' settlement with parties responsible for their injuries.[10]

The Plan seeks to enforce the provisions of ERISA which vest in the Plan administrator the exclusive authority and control of Plan assets and to enforce the Plan's terms concerning reimbursement. ERISA provides that the administrators of employee benefits plans have the exclusive authority and responsibility to control

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[9] *See In re Paris*, No. 99-1558, 2000 U.S. App. LEXIS 6883 (4th Cir. Apr. 17, 2000) (copy attached as Exhibit F hereto) (holding that common law make-whole rule does not apply when it overrides plan terms). Here, the Plan terms not ~~only do not in~~corporate the make whole rule, but rather, specifically disclaim it by stating that "[t]he Company's share of the recovery will not be reduced because you or your dependent has not received the full damages claimed, unless the Company agrees in writing to a reduction." The make-whole rule, therefore, does not apply here.

[10] *See In Re Carpenter*, No. 00-2348, 2002 U.S. App. LEXIS 10615 (4th Cir. June 3, 2002) (allowing equitable relief under *Knudson* where a defendant had control of identifiable funds).

and manage plan assets in the best interest of all participants and beneficiaries.[11]

Here, despite being required to reimburse the Plan, the Sereboffs have violated the terms of the Plan by accepting the settlement and refusing to reimburse the Plan. The Sereboffs are seeking to avoid the effect of the Plan's terms.

2. Plaintiff will suffer irreparable injury without a preliminary injunction.

A preliminary injunction is appropriate "to prevent a defendant from making a judgment uncollectible" and thereby to "protect the possibility of [an] equitable remedy."[12] The relief that Plaintiff seeks here is purely equitable relief pursuant to ERISA, 29 U.S.C. § 1132(a)(3), as the Supreme Court and United States District Courts in the Eleventh Circuit post- *Knudson* have ruled. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 122 S. Ct. 708 (2002); *Great-West v. Brown*, 192 F. Supp. 2d 1376 (M.D. Ga. 2002). As set forth below, this Court should grant Plaintiff a temporary restraining order and, upon notice and hearing, a preliminary injunction to prevent Defendants from placing any of the disputed funds in their possession beyond the reach of the Court and Plaintiff. Without a preliminary injunction, Defendants will be able to place all of the settlement monies beyond the reach of the Court and

---

[11] See 29 U.S.C. § 1102(a)(1) (the plan must be administered pursuant to a written instrument and named plan fiduciaries have authority "to control and manage the operation and administration of the Plan").

[12] *FTC v. Singer*, 668 F.2d 1107,1112 (9th Cir. 1982); *In re Marcos*, 25 F.3d 1467,1479 (9th Cir. 1994); *Republic of Philippines v. Marcos*, 806 F.2d 344,356 (2d Cir. 1986); *Seide v. Crest Color, Inc.*, 835 F. Supp. 732, 735 (S.D.N.Y. 1993); *Cattle Finance Co. v. Boedery, Inc.*, 795 F. Supp. 362 (D. Kan. 1992).

Plaintiff. Plaintiff will suffer irreparable injury without the issuance of a preliminary injunction.

3. The balance of hardships.

The Sereboff Defendants received personal injury settlement funds because of their injuries. See Verified Complaint, ¶ 14. Additionally, the Sereboffs have willingly accepted $74, 869.37 from the Plan to pay for their medical expenses, while expressly agreeing to reimburse the Plan for those expenses. *Id.* at ¶¶ 11,12. The Sereboffs will not be harmed because granting the request for relief will merely maintain the status quo until a final determination can be made on this matter. Conversely, if this request is not granted, the Sereboffs will be able to deplete funds owed to Plaintiff. Thus, injunctive relief is necessary and appropriate.

4. The public interest is advanced by issuing a preliminary injunction.

This factor also supports Plaintitff's request for relief because without the assurance that Plaintiff can recover benefits paid to Plan participants and beneficiaries where those parties recover from third parties, the stability of many plans would be substantially compromised and could cause some companies to discontinue or greatly scale back the scope of the benefits provided. *See Cutting v. Jerome Foods, Inc.*, 993 F .2d 1293 (7th Cir. 1993). Accordingly, this Court should grant Plaintiffs request for relief.

CONCLUSION

Based on the foregoing, this Court should grant Plaintift's motion for a temporary restraining order and after notice and a hearing on this matter, this Court should issue a preliminary injunction enjoining Defendants, and all those in active concert or participation with them, including their attorneys, from disbursing or otherwise dissipating the disputed funds.

Date: August 5,2003.

Respectfully submitted,

By: /S/_____

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* Application for *Pro Hac Vice* to be filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

MID ATLANTIC MEDICAL SERVICES, INC.,	
Plaintiff	
v.	
JOEL SEREBOFF, MARLENE SEREBOFF, JOHN STEIN AND THE BOCCARDO LAW FIRM, LLP,	03CV2269 Case No.
Defendants	

TEMPORARY RESTRAINING ORDER

Based upon Plaintiffs motion and memorandum, Plaintiffs Verified Complaint, and the record as a whole, the Court finds that Plaintiff will suffer immediate and irreparable injury if this motion is not granted and, thus, Plaintiffs motion for a temporary restraining order is well-taken and should be granted.

The Court makes the following factual findings:

1. Defendants Marlene and Joel Sereboff (the "Serebotl's") are "Covered Persons" under the MAMSI Life and Health Insurance PPO Plan (the "Plan"), which is

sponsored by Katzen Eye Group (Verified Complaint, ¶¶ 2, 9).

2. On June 22, 2000, the Sereboffs were injured in an accident. (Verified Complaint, ¶ 10).

3. In connection with the injuries from this accident, the Plan paid medical benefits on behalf of the Sereboffs in the amount of $74,869.37. (Verified Complaint, ¶¶ 15,16).

4. The Plan contains an acts of third parties provision, which states:

> ACTS OF THIRD PARTIES
>
> This subrogation provision applies when you are sick or injured as a result of the act or omission of another person or party. Subrogation means the Company's right to recover any payments made to you or your dependent by a third party or any insurer acting in place of, or on behalf of a third party or a third party's insurer, because of an injury or illness caused by a third party. Third party means another person or organization.
>
> If you or your dependent receives benefits and have a right to recover damages from a third party, the Company is subrogated to this right. All recoveries from a third party (whether by lawsuit, settlement, or otherwise) must be used to reimburse the Company net of reasonable attorney fees and court costs prorated to reflect that portion of the total recovery which is due the Company for benefits paid. Any remainder will be yours or your dependents. The Company's share of the recovery will not be reduced because you or your dependent has not received the full damages claimed, unless the Company agrees in writing to a reduction.

> You must promptly advise the Company whenever a claim is made against a third party with respect to any loss for which the Company benefits have been or will be paid. You or your dependent must execute any assignments, liens or other documents and provide information as the Company requests. MLH's benefits may be withheld until documents or information are received. If you need more information about subrogation, the Company will provide you with its subrogation procedures.

(Verified Complaint, ¶ 13).

5. The Sereboffs have settled their claims in a personal injury action for an amount in the excess of the Plan's claim. (Verified Complaint, ¶ 14).

6. Defendants have refused to reimburse the Plan in accordance with the Plan terms. (Verified Complaint, ¶¶ 15 - 17).

The Court makes the following conclusions of law:

1. This Court has subject matter jurisdiction over this action and *in personam* jurisdiction over Defendants. Venue is proper in this Court.

2. This action arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1132(a)(3).

3. The terms of the Plan provide for reimbursement, to the extent of benefits paid, from covered persons for sums paid by the Plan to the participants and/or their beneficiaries which the participant or beneficiary is able to recover from third parties.

4. Because a *res* exists over which this Court can impose final equitable relief, ERISA preempts state law, and the Plan provides for 100% reimbursement from Plan participants and their beneficiaries as set forth above, Plaintiff has demonstrated a strong likelihood of success on the merits. *See Administrative Committee of the Wal-Mart Stores, Inc. Associates Health and Welfare Plan v. Varco*, No. 01 C 8277, 2002 U.S. Dist. LEXIS 530 (N.D. Ill. Jan.14, 2002) ("[w]here Wal-Mart filed an original action to impose a constructive trust to avoid dissipation before its right to share in the fund could be adjudicated, a *res* exists over which this court has assumed jurisdiction. This is request for equitable relief and therefore this court has exclusive jurisdiction under 29 U.S.C. § 1132(e)(I)"); *In Re Carpenter*, No. 00"2348, 2002 U.S. App. LEXIS 10615 (4th Cir. June 3, 2002) (allowing equitable relief under *Knudson* where a defendant had control of identifiable funds); *Great-West Life & Annuity Ins. Co. v. Brown*, 192 F. Supp. 2d 1376 (M.D. Ga. 2002) (federal court distinguished *Knudson* and found that disputed funds were identifiable and traceable when covered person's attorney was holding funds).

5. The actions of Defendants, and all those in active concert or participation with them, unless restrained and enjoined until the hearing on Plaintiff's motion for preliminary injunction, will likely cause Plaintiff to suffer immediate and irreparable injury because Defendants have the ability, unless restrained, to dissipate these funds and place the funds beyond the reach of the Court and Plaintiff, thereby preventing the Court from imposing final equitable relief in this matter.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that:

1) Defendants, and all those acting in concert or participation with them, are restrained from

disposing anyof the $74,869.37 recovered from a settlement proceeds until Plaintiffs motion for Preliminary Injunction is decided.

2) A hearing on Plaintiffs motion for preliminary injunction is set for August ___, 2003, at _____.

3) Plaintiff shall post a bond with the Clerk in the amount of $1,000 within three days from the date of this order.

END OF ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

MID ATLANTIC MEDICAL SERVICES, INC., Plaintiff	
v.	
JOEL SEREBOFF, MARLENE SEREBOFF, JOHN STEIN AND THE BOCCARDO LAW FIRM, LLP, Defendants	Case No.1:03-cv-02269-AMD

ORDER GRANTING STIPULATION TO PRESERVE FUNDS, WITHDRAW MOTION FOR A PRELIMINARY INJUNCTION, AND BRIEFING SCHEDULE

Pursuant to the agreement of the parties as acknowledged by their signatures below, the Court orders:

1. Defendants Joel Sereboff and Marlene Sereboff shall preserve $74,869.37 of the settlement funds recovered because of injuries sustained on or about June 22, 2000, which are currently held in investment accounts, (and must keep the settlement funds in those investment accounts) until the Court rules on the merits of this case and all appeals, if any, are exhausted;
2. Plaintiff's Motion for Preliminary Injunction is withdrawn as moot;
3. By September 5, 2003, Defendants may move to dismiss pursuant to Fed. R. Civ. P.12(b)(6);

4. By September 19,2003, Plaintiff may respond to Defendants' filings.
5. By September 26,2003, Defendants may reply to Plaintiffs response.

SO ORDERED, On August ___,2003.

_____
J. Frederick Motz
United States District Judge

APPROVED AS TO FORM:

By:___/S/_____
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ATTORNEY FOR PLAINTIFF

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ATTORNEY FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

MID ATLANTIC MEDICAL SERVICES, INC.,	
Plaintiff	
v.	
JOEL SEREBOFF, MARLENE SEREBOFF, JOHN STEIN AND THE BOCCARDO LAW FIRM, LLP,	03CV2269 Case No.
Defendants	

TEMPORARY RESTRAINING ORDER

Based upon Plaintiffs motion and memorandum, Plaintiffs Verified Complaint, and the record as a whole, the Court finds that Plaintiff will suffer immediate and irreparable injury if this motion is not granted and, thus, Plaintiffs motion for a temporary restraining order is well-taken and should be granted.

The Court makes the following factual findings:

1. Defendants Marlene and Joel Sereboff (the "Serebotl's") are "Covered Persons" under the MAMSI Life and Health Insurance PPO Plan (the "Plan"), which is

sponsored by Katzen Eye Group (Verified Complaint, ¶¶ 2, 9).

2. On June 22, 2000, the Sereboffs were injured in an accident. (Verified Complaint, ¶ 10).

3. In connection with the injuries from this accident, the Plan paid medical benefits on behalf of the Sereboffs in the amount of $74,869.37. (Verified Complaint, ¶¶ 15,16).

4. The Plan contains an acts of third parties provision, which states:

> ACTS OF THIRD PARTIES
>
> This subrogation provision applies when you are sick or injured as a result of the act or omission of another person or party. Subrogation means the Company's right to recover any payments made to you or your dependent by a third party or any insurer acting in place of, or on behalf of a third party or a third party's insurer, because of an injury or illness caused by a third party. Third party means another person or organization.
>
> If you or your dependent receives benefits and have a right to recover damages from a third party, the Company is subrogated to this right. All recoveries from a third party (whether by lawsuit, settlement, or otherwise) must be used to reimburse the Company net of reasonable attorney fees and court costs prorated to reflect that portion of the total recovery which is due the Company for benefits paid. Any remainder will be yours or your dependents. The Company's share of the recovery will not be reduced because you or your dependent has not received the full damages claimed, unless the Company agrees in writing to a reduction.

> You must promptly advise the Company whenever a claim is made against a third party with respect to any loss for which the Company benefits have been or will be paid. You or your dependent must execute any assignments, liens or other documents and provide information as the Company requests. MLH's benefits may be withheld until documents or information are received. If you need more information about subrogation, the Company will provide you with its subrogation procedures.

(Verified Complaint, ¶ 13).

5. The Sereboffs have settled their claims in a personal injury action for an amount in the excess of the Plan's claim. (Verified Complaint, ¶ 14).

6. Defendants have refused to reimburse the Plan in accordance with the Plan terms. (Verified Complaint, ¶¶ 15 - 17).

The Court makes the following conclusions of law:

1. This Court has subject matter jurisdiction over this action and *in personam* jurisdiction over Defendants. Venue is proper in this Court.

2. This action arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1132(a)(3).

3. The terms of the Plan provide for reimbursement, to the extent of benefits paid, from covered persons for sums paid by the Plan to the participants and/or their beneficiaries which the participant or beneficiary is able to recover from third parties.

4. Because a *res* exists over which this Court can impose final equitable relief, ERISA preempts state law, and the Plan provides for 100% reimbursement from Plan participants and their beneficiaries as set forth above, Plaintiff has demonstrated a strong likelihood of success on the merits. *See Administrative Committee of the Wal-Mart Stores, Inc. Associates Health and Welfare Plan v. Varco*, No. 01 C 8277, 2002 U.S. Dist. LEXIS 530 (N.D. Ill. Jan.14, 2002) ("[w]here Wal-Mart filed an original action to impose a constructive trust to avoid dissipation before its right to share in the fund could be adjudicated, a *res* exists over which this court has assumed jurisdiction. This is request for equitable relief and therefore this court has exclusive jurisdiction under 29 U.S.C. § 1132(e)(I)"); *In Re Carpenter*, No. 00"2348, 2002 U.S. App. LEXIS 10615 (4th Cir. June 3, 2002) (allowing equitable relief under *Knudson* where a defendant had control of identifiable funds); *Great-West Life & Annuity Ins. Co. v. Brown*, 192 F. Supp. 2d 1376 (M.D. Ga. 2002) (federal court distinguished *Knudson* and found that disputed funds were identifiable and traceable when covered person's attorney was holding funds).

5. The actions of Defendants, and all those in active concert or participation with them, unless restrained and enjoined until the hearing on Plaintiff's motion for preliminary injunction, will likely cause Plaintiff to suffer immediate and irreparable injury because Defendants have the ability, unless restrained, to dissipate these funds and place the funds beyond the reach of the Court and Plaintiff, thereby preventing the Court from imposing final equitable relief in this matter.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that:

1) Defendants, and all those acting in concert or participation with them, are restrained from disposing anyof the $74,869.37 recovered from a settlement proceeds until Plaintiffs motion for Preliminary Injunction is decided.

2) A hearing on Plaintiffs motion for preliminary injunction is set for August 12, 2003, at 3:00 p.m.

3) Plaintiff shall post a bond with the Clerk in the amount of $1,000 within three days from the date of this order.

END OF ORDER

/S/ of Judge Motz
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

MID ATLANTIC MEDICAL SERVICES, INC., Plaintiff	
v.	
JOEL SEREBOFF, MARLENE SEREBOFF, JOHN STEIN AND THE BOCCARDO LAW FIRM, LLP, Defendants	Case No.1:03-cv-02269-AMD

ORDER GRANTING STIPULATION TO PRESERVE FUNDS, WITHDRAW MOTION FOR A PRELIMINARY INJUNCTION, AND BRIEFING SCHEDULE

Pursuant to the agreement of the parties as acknowledged by their signatures below, the Court orders:

Defendants Joel Sereboff and Marlene Sereboff shall preserve $74,869.37 of the settlement funds recovered because of injuries sustained on or about June 22, 2000, which are currently held in investment accounts, (and must keep the settlement funds in those investment accounts) until the Court rules on the merits of this case and all appeals, if any, are exhausted;

2. Plaintiff's Motion for Preliminary Injunction is withdrawn as moot;
3. By September 5, 2003, Defendants may move to dismiss pursuant to Fed. R. Civ. P.12(b)(6);

4. By September 19,2003, Plaintiff may respond to Defendants' filings.
5. By September 26,2003, Defendants may reply to Plaintiffs response.

SO ORDERED, On August 11 ,2003.

_____/S/_____
J. Frederick Motz
United States District Judge

APPROVED AS TO FORM:

By:___/S/_____
Holly J. Schimmel
LAWRENCE & RUSSELL, LLP
5050 Poplar Avenue, Suite 1717
Memphis, Tennessee 38157
Telephone: (901) 844-4439
Facsimile: (901) 888-4435
ATTORNEY FOR PLAINTIFF

By : ____/S/_____
THE BOCCARDO LAW FIRM LLP
111 West St. John Street
Eleventh Floor
P.O. Box 15001
San Jose, California 95115-0001
Telephone: (408) 298-5678
Facsimile: (408) 298-7503
ATTORNEY FOR DEFENDANTS

Exhibit 1

MAMSI [image omitted]
LIFE AND HEALTH
INSURANCE COMPANY

4 Taft Court
Rockville, MD 20850

46 02 06 473 11/00

MAMSI
LIFE AND HEALTH INSURANCE COMPANY
PPO
[image omitted]
Group Certificate
Schedule 7J

Rockville, Maryland

The following rules apply to enrollees and their family members who are entitled to benefits from both the Company and Medicare:

The Company is primary if:

(1) You are age 65 or over, have Medicare Part A (or Parts A and B) and employed by the Federal Government;

(2) Your covered spouse is age 65 or over and has Medicare Part A (or Parts A and B) and either you or your spouse id employed;

(3) The patient (you or a covered family member) is within the first thirty (30) months of eligibility to receive Medicare Part A benefits due to End Stage Renal Disease (ESRD), except when Medicare was the

patient's primary payer on the day before he or she became eligible for Medicare Part A due to ESRD; or

(4) The Patient (you or a covered family member) is under age 65 and eligible for Medicare solely on the basis of disability, and you are employed.

Medicare is primary if:

(1) You are an annuitant age of 65 or over, covered by Medicare Part A (or Parts A and B) and are not actively employed;

(2) Your covered spouse is age 65 or over ad has Medicare Part A (or Parts A or B) and neither you nor your spouse is actively employed;

(3) You are an annuitant not actively employed and either you or a covered family member (who may or may not be employed by employer who does not meet the "100 or More Employees Threshold" and covers you on his/her policy) is under age 65 and eligible for Medicare on the basis of disability;

(4) You are enrolled in Part B only, regardless of your employment status;

(5) The patient (you or a covered family member) has completed the thirty (30) month ESRD coordination period and is still eligible for Medicare due to ESRD; or

(6) The patient (you or a covered family member) becomes eligible for Medicare due to ESRD after Medicare assumed primary payer status for the patient under rule 1).

Medicare's payment and the Company

If you are covered by Medicare Part B and it is primary, you should be aware that your out-of-pocket costs for services covered by both the Company and Medicare Part B will depend on whether your doctor accepts Medicare assignment for claim. Medicare-participating doctors

accept assignment; that is, they have agreed not to bill you for more than the Medicare-approved amount for covered services. Some non-Medicare-participating doctors accept assignment on certain claims. If you use a doctor who accepts Medicare assignment for the claim, the doctor is permitted to bill you after the Company has paid only in those instances where the Medicare and the Company payments combined do not total the Medicare-approved amount.

Non-Medicare-participating doctors do not need to accept assignment. When they do not accept assignment on a claim they can not bill you for more than the Medicare-approved amount – up to a limit set by the Medicare law (the Social Security Act, 4 U.S.C.) called the limiting charge. The limiting charge is 115 percent of the Medicare approved amount. If you use a doctor who does not accept assignment for the claim, the doctor is permitted to bill you after the Company has paid only if the Medicare and the Company payments combined do not total the limiting charge set by Medicare law for non-Medicare-participating doctors. Neither you nor the Company is liable for any amount in excess of the Medicare limiting charge for the charges of a non-participating Medicare doctor. The Medicare Explanation of benefits (EOB) form will have more information about this limit.

In most cases, when services are covered by both Medicare and the Company, Medicare is the primary payer if you are an annuitant and the Company is the primary if you are an employee. When Medicare is the primary payer, your claims should first be submitted to Medicare.

After Medicare has paid its benefits, the Carrier will consider the balance of any covered expenses. To be sure

your claims are processed by this Carrier you must submit the EOB form from Medicare and duplicates of all bills along with a completed claim form. The carrier will not process your claim without knowing whether you have Medicare and, if you do, without receiving the Medicare EOB.

Worker's Compensation

The Company will not pay for benefits or services required as the result of occupational disease or injury that medical benefits are payable under worker's compensation or by a similar agency under another Federal or State law. This provision also applies when a third party injury settlement or other similar proceeding provides medical benefits in regard to a claim (or potential claim) under worker's compensation or similar laws. If medical benefits provided under such laws are exhausted, medical benefits may be provided for services or supplies covered by the Company. The Company is entitled to be reimbursed for benefits paid by the Company that were later found to be payable under worker's compensation or by a similar agency under Federal or State law.

The Company may release, claim or obtain any necessary information from any insurance company or other organization to carry out this provision. In addition, any Member claiming benefits from MLH shall furnish MLH with information, as requested, necessary to administer this provision. If the member refuses to cooperate withMLH to implement this provision, the Member must pay to MLH the Usual, Customary and Reasonable Fee for the services rendered.

ACTS OF THIRD PARTIES

This subrogation provision applies when you are sick or injured as a result to the act or omission of another person

or party. Subrogation means the Company's right to recover any payments made to you or your dependent by a third party or any insurer acting in place of, or on behalf of a third arty or a third party's insurer, because of an injury or ill ness caused by a third party. Third party means another person or organization.

If you or your dependent receives benefits and have a right to recover damages from a third party, the Company is subrogated to this right. All recoveries from a third party (whether by lawsuit, settlement, or otherwise) must be used to reimburse the Company net of reasonable attorney fees and court costs prorated to reflect that portion of the total recovery which is due the Company for benefits paid. Any remainder will be yours or your dependents. The Company's share of the recovery will not be reduced because you or your dependent has not received the full damages claimed, unless the Company agrees in writing to a reduction.

You must promptly advise the Company whenever a claim is made against a third party with respect to any loss for which the Company benefits have been or will be paid. You or your dependent must execute any assignments, liens or other documents and provide information as the Company requests. MLH's benefits may be withheld until documents or information are received. If you need more information about subrogation, the Company will provide you with its subrogation procedures.

SCHEDULE OF INSURANCE
SCHEDULE 7J

To receive medial care covered under this group Policy, You may select a medical provider of Your choice. There are two classes of providers under this Group Policy,

Preferred providers and non-Preferred providers. The providers listed in your Directory are Preferred Providers. You will be responsible for any applicable Deductible, Copayment and Co-insurance. The Preferred Providers have agreed to accept the Company's payment plus your Deductible, Copayment, or Coinsurance as full payment for the claim. If You choose a non-Preferred Provider, the Company is responsible for paying the lesser of the applicable percentage of the requested Charge or the Usual Customary and Reasonable Charge authorized by the Company. You will be responsible for any applicable Deductible and Copayment plus the balance, if any, of the non-Preferred Provider's charge. Generally, Your Out-of-Pocket expense will be lower if You use a Preferred Provider rather than a non-Preferred Provider.

Note: If you use a preferred facility, keep in mind that the professionals who provide services to you in the facility such as radiologists, anesthesiologists, pathologists and neonatologists may not be Preferred Providers. If they are not, they will be paid as Non-Preferred Providers.

Benefits will be paid at the Preferred Provider level when care is received from a non-Preferred Provider for any of the following reasons:

a. a Preferred Provider is not reasonably available, as determined by the Company;
b. the Member is referred to a non-Preferred Provider by a Preferred Provider.
c. the Member requires care from a type of provider which is not enrolled in the Company;
d. Emergency care; or;
e. Out-of area care for unexpected illness or injury.

MAMSI Life and Health Insurance Company(herein called the Company) provides benefits, as shown below in the Health Services, Limits, and Percentages Payable section, for a member when he or she received treatment or service as outlines above.

ANNUAL DEDUCTIBLES:

For non-Preferred Providers:

$300 per Member but not more than

$600 per family each Contract Year.

The Annual Deductible does not apply to child wellness and mammography services.

MAXIMUM OUT-OF-POCKET EXPENSE:

For Preferred and non-Preferred Providers:

$1,300 per Member but not more than

$2,600 per family each Contract Year.

Exhibit 2

ATTORNEY OR PARTY WITHOUT ATTORNEY (NAME AND ADDRESS): JOHN C. STEIN, ESQ. THE BOCCARDO LAW FIRM 111 West St. John Street, Suite 1100 P.O. Box 15001 San Jose, CA 95115-0001 ATTORNEY FOR (NAME): Joel and Marlene Sereboff TELEPHONE: (408) 298-5678	FOR COURT USE ONLY (ENDORSED) 2000 AUG 11 P.M. 1:18 A. NELSON
Insert name of court, judicial district or	

branch court, if any, and post office and street address: SANTA CLARA COUNTY SUPERIOR COURT 191 North First Street 191 North First Street San Jose, CA 95113	
PLAINTIFF: JOEL SEREBOFF AND MARLENE SEREBOFF	
DEFENDANT: LANCASTER COLONY CORPORATION, a corporation, BUDGET RENT-A-CAR CORPORATION, a corporation, TEAM FLEET FINANCING COPORATION, a corporation, CHARLES E. ROEDERER, and X Does 1 to 50	
COMPLAINT – Personal Injury, Property Damage, Wrongful Death X Motor Vehicle ☐ Property Damage X Personal Injury X OTHER *(specify)*: General Negligence Motor Vehicle ☐ Wrongful Death ☐ Other Damages: *(specify)*	Case number: CV791810

1. This pleading, including attachments and exhibits, consists of the following number of pages: 5

2. a. Each plaintiff named above is a competent adult
   ☐ Except plaintiff *(name)*:

☐ a corporation qualified to do business in California;

☐ an unincorporated entity *(describe)*:

☐ a public entity *(describe)*:

☐ a minor ☐ an adult

☐ for whom a guardian or conservator of the estate or a guardian ad litem has been appointed

☐ other *(specify)*:

☐ other *(specify)*:

☐ Except plaintiff *(name)*:

☐ a corporation qualified to do business in California;

☐ an unincorporated entity *(describe)*:

☐ a public entity *(describe)*:

☐ a minor ☐ an adult

☐ for whom a guardian or conservator of the estate or a guardian ad litem has been appointed

☐ other *(specify)*:

other *(specify)*:

b. ☐ Plaintiff *(name)*:

is doing business under the fictitious name of *(specify)*:

and has complied with the fictitious business name laws.

c. ☐ Information about additional plaintiffs who are not competent adults is shown in Complaint – Attachment 2c.

(Continued)

SHORT TITLE: SEREBOFF, et al. v. LANCASTER COLONY CORPORATION, et al.	CASE NUMBER

COMPLAINT – Personal Injury, Property Damage, Wrongful Death

3. a. Each defendant named above is a natural person

X Except defendant *(name):* Lancaster Colony

☐ a business organization, form unknown

X a corporation

☐ an unincorporated entity *(describe):*

☐ a public entity *(describe):*

☐ other *(specify):*

X Except defendant *(name):* Budget Rent A Car Corporation

☐ a business organization, form unknown

X a corporation

☐ an unincorporated entity *(describe):*

☐ a public entity *(describe):*

☐ other *(specify):*

☐ Except defendant *(name)* Team Fleet Financing Corporation

☐ a business organization, form unknown

X a corporation

☐ an unincorporated entity *(describe):*

☐ a public entity *(describe):*

☐ other *(specify):*

☐ Except defendant *(name):*

☐ a business organization, form unknown

☐ a corporation

☐ an unincorporated entity (*describe):*

☐ a public entity *(describe):*

☐ other *(specify):*

b. The true names and capacities of defendants sued as Does are unknown to plaintiff.

c. ☐ Information about additional defendants who are not natural persons is contained in Complaint – Attachment 3c.

d. ☐ Defendants who are joined pursuant to Code of Civil Procedure section 382 are *(names):*

4. ☐ Plaintiff is required to comply with a claims statute, and

a. ☐ plaintiff has complied with applicable claims statutes, or

b. ☐ plaintiff is excused from complying because *(specify):*

5. This court is the proper court because

☐ at least one defendant now resides in its jurisdictional area.

☐ the principal place of business of a corporation or unincorporated association in its jurisdictional area

X injury to person or damage to personal property occurred in its jurisdictional area.

☐ other *(specify):*

6. ☐ The following paragraphs of this complaint are alleged on information and belief *(specify paragraph numbers):*

(Continued)

SHORT TITLE: SEREBOFF, et al. v. LANCASTER COLONY CORPORATION, et al.	CASE NUMBER:

COMPLAINT – Personal Injury, Property Damage, Wrongful Death (Continued)

7. ☐ The damages claimed for wrongful death and the relationships of plaintiff to the deceased are
   ☐ listed in Complaint – Attachment 7 ☐ as follows:

8. Plaintiff has suffered
   X wage loss
   ☐ loss of use of property
   X hospital and medical expenses
   X general damages
   ☐ property damage
   X loss of earning capacity
   X other damage *(specify):* Prejudgment interest as allowed by law

9. Relief sought in this complaint is within the jurisdiction of his court.

10. PLAINTIFF PRAYS
    For judgment for costs of suit; for such relief as is fair, just, and equitable; and for
    X compensatory damages

X (Superior Court) according to proof.

☐ (Municipal and Justice Court) in the amount of $_____

☐ other *(specify):*

11. The following causes of action are attached and the statements above apply to each: *(Each complaint must have one or more causes of action attached.)*

X Motor Vehicle

X General Negligence

☐ Intentional Tort

☐ Products Liability

☐ Premises Liability

☐ Other *(specify):*

THE BOCCARDO LAW FIRM LLP
JOHN C. STEIN _____/s/_____
(Signature of plaintiff or attorney)

SHORT TITLE: SEREBOFF, et al. v. LANCASTER COLONY CORPORATION, et al.	CASE NUMBER:

FIRST CAUSE OF ACTION – Motor Vehicle

ATTACHMENT TO X Complaint ☐ Cross-Complaint

(Use a separate cause of action form for each cause of action.)

Plaintiff *(name)*: JOEL SEREBOFF and MARLENE SEREBOFF

MV-1: Plaintiff alleges the acts of defendants were negligent; the acts were the legal (proximate) cause of injuries and damages to plaintiff; the acts occurred on *(date):* 6/22/00 at *(place):* or near San Jose Airport on the

Green Lot Entry Road, in the city of San Jose, County of Santa Clara, State of California.

MV-2. DEFENDANTS

a. X The defendants who operated the motor vehicle are *(names)*: CHARLES E. ROEDERER, and

X Does 1 to 50

b. X The defendants who employed the persons who operated a motor vehicle in the course of their employment are *(names)*: LANCASTER COLONY CORPORATION

X Does 1 to 50

c. X The defendants who owned the motor vehicle which was operated with their permission are *(names)*: BUDGET RENT-A-CAR CORPORATION, TEAM FLEET FINANCING CORPORATION, and

X Does 1 to 50

d. X The defendants who entrusted the motor vehicle are *(names)*: ALL NAMED DEFENDANTS and

X Does 1 to 50

e. X The defendants who were the agents and employees of the other defendants and acted within the scope of the agency were *(names)*: CHARLES E. ROEDERER, and

X Does 1 to 50

f. X The defendants who are liable to plaintiffs for other reasons and the reasons for the liability are

☐ listed in Attachment MV-3f X as follows:

unknown at this time

X Does 1 to 50

SHORT TITLE: SEREBOFF, et al. v. LANCASTER COLONY CORPORATION, et al.	CASE NUMBER:

SECOND CAUSE OF ACTION – General Negligence

ATTACHMENT TO X Complaint ☐ Cross-Complaint

(Use a separate cause of action form for each cause of action.)

GN – 1. Plaintiff *(name)*: JOEL SEREBOFF and MARLENE SEREBOFF alleges that defendant *(name)*: LANCASTER COLONY CORPORATION, BUDGET RENT A CAR, TEAM FLEET FINANCING, CHARLES E. ROEDERER, and

X Does 1 to 50

was the legal (proximate) cause of damages to plaintiff. By the following acts or omissions to act, defendant negligently caused the damage to plaintiff on *(date)*: 6/22/00 at *(place)*: on or about San Jose Airport, on the Green Lot Entry Road, in the City of San Jose, County of Santa Clara, State of California

(description of reasons for liability):

(a) Plaintiff refers to and incorporates herein by this reference all of the allegations of the First Cause of Action (Motor Vehicle) as if set forth in full hereinbelow.

(b) At said time and place alleged hereinabove, Defendants LANCASTER COLONY CORPORATION, BUDGET RENT A CAR, TEAM FLEET FINANCING, CHARLES E. ROEDERER, and DOES 1 to 50, inclusive, and each of them, owed a duty to Plaintiffs to act reasonably regarding their ownership, entrustment, operation, maintenance and

control of their motor vehicle involved in the collision which occurred at said time and place hereinabove alleged and to own, entrust, operate, maintain and control said vehicle in a safe and legal manner. Said defendants breached their duty of care in that while operating the vehicle owned by Defendant BUDGET RENT A CAR and TEAM FLEET FINANCING, Defendants CHARLES E. ROEDERER made an unsafe left turn into the path of Plaintiffs' oncoming vehicle, causing said vehicle to forcibly collide with Defendants' vehicle, knocking Plaintiffs' vehicle had on into a concrete barrier wall. As a result of the negligence, carelessness and recklessness of Defendants, and each of them, Plaintiffs sustained severe personal injuries and damages.

(c) As a direct and proximate result of the negligence and carelessness of Defendants, and each of them, as herein alleged, Plaintiffs sustained serious injuries in the collision, resulting in damages to Plaintiffs as hereinabove alleged.

Exhibit 3

[image omitted]

October 18, 2000

JOHN STEIN
ATTORNEY AT LAW
111 WEST ST. JOHN ST.
SAN JOSE, CA 95115

RE: Marlene D. Sereboff
M219446706*01
DOI: June 22, 2000

Dear Counsel:

MAMSI Life and Health Insurance Co. has been advised that you have been retained to represent the referenced member in connection with claims for personal injuries which arose through the negligence of a third party.

As stated in the member's healthcare policy, if a member of MAMSI Life and Health Insurance Co. is injured or becomes ill through the act or neglect of another party and recovers money from the third party insurance company and/or their own insurance, reimbursement must be made to MAMSI Life and Health Insurance Co. for the reasonable cash value of the claims paid by MAMSI Life and Health Insurance Co..

This letter is to give written notice of MAMSI Life and Health Insurance Co.'s subrogation lien for medical bills processed on behalf of our member. The current amount of our lien is identified on the attached Summary of Paid Claims. This amount will be updated as additional claims are processed.

MAMSI Life and Health Insurance Co. would like to offer you the opportunity to assert our lien and will agree to a contingency fee arrangement as long as it does not exceed one fourth of the amount recovered for MAMSI Life and Health Insurance Co..

If you are willing to proceed under the terms of this agreement, please sign the enclosed agreement and return it in the pre-addressed envelope by November 1, 2000. Your immediate attention is requested, otherwise we will be compelled to retain counsel to pursue recovery of our lien and will not be responsible for any portion of the member's attorney fees.

Sincerely,

/s/ of Jerry Bandler

Karen Perkins
Sr. Subrogation Coordinator
(301) 360-8768

Encl. cc: Marlene D. Sereboff

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

[image omitted]

October 18, 2000

JOHN STEIN
ATTORNEY AT LAW
111 WEST ST. JOHN ST.
SAN JOSE, CA 95115

RE: Joel Sereboff
M219446706*02
DOI: June 22, 2000

Dear Counsel:

MAMSI Life and Health Insurance Co. has been advised that you have been retained to represent the referenced member in connection with claims for personal injuries which arose through the negligence of a third party.

As stated in the member's healthcare policy, if a member of MAMSI Life and Health Insurance Co. is injured or becomes ill through the act or neglect of another party and recovers money from the third party insurance company and/or their own insurance, reimbursement must be made to MAMSI Life and Health Insurance Co. for the reasonable cash value of the claims paid by MAMSI Life and Health Insurance Co..

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MAMSI Life and Health Insurance Co. would like to offer you the opportunity to assert our lien and will agree to a contingency fee arrangement as long as it does not exceed

one fourth of the amount recovered for MAMSI Life and Health Insurance Co..

If you are willing to proceed under the terms of this agreement, please sign the enclosed agreement and return it in the pre-addressed envelope by November 1, 2000. Your immediate attention is requested, otherwise we will be compelled to retain counsel to pursue recovery of our lien and will not be responsible for any portion of the member's attorney fees.

Sincerely,

/s/ of Jerry Bandler

Karen Perkins
Sr. Subrogation Coordinator
(301) 360-8768

Encl. cc: Joel Sereboff

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

Exhibit 4

[image omitted]

October 18, 2000

Marlene D. Sereboff
2215 MILLRIDGE RD
OWINGS MILLS, MD 21117

RE: Marlene D. Sereboff
M219446706*01

Dear Ms. Sereboff:

Our office has been informed that the above MAMSI Life and Health Insurance Co. member was involved in an accident on June 22, 2000. To date, we have processed a total of $67,670.65 in medical bills resulting from this accident. If additional medical bills received and/or approved after the date of this letter, the above stated amount is subject to increase.

As stated in your Evidence of Coverage, if a member of MAMSI Life and Health Insurance Co. is injured or becomes ill through the act or neglect of another party and recovers money from the other parties insurance company and/or their own insurance, reimbursement must be made to MAMSI Life and Health Insurance Co. for the reasonable cash value of claims paid by MAMSI Life and Health Insurance Co.. Please sign the attached agreement regarding the above statements and return it to MAMSI Life and Health Insurance Co. in the enclosed pre-addressed envelope.

If you should have any questions, please contact me at (301) 360-8768. Thank you for your cooperation in this coordination of benefits matter and for your membership in MAMSI Life and Health Insurance Co. Health Plan.

Sincerely,

/s/ of Jerry Bandler

Karen Perkins
Sr. Subrogation Coordinator
MAMSI Life and Health Insurance Co.

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

Exhibit 5

[image omitted]

October 18, 2000

Marlene D. Sereboff
2215 MILLRIDGE RD
OWINGS MILLS, MD 21117

RE: Joel Sereboff
M219446706*02

Dear Ms. Sereboff:

Our office has been informed that the above MAMSI Life and Health Insurance Co. member was involved in an accident on June 22, 2000. To date, we have processed a total of $5,797.60 in medical bills resulting from this accident. If additional medical bills received and/or approved after the date of this letter, the above stated amount is subject to increase.

As stated in your Evidence of Coverage, if a member of MAMSI Life and Health Insurance Co. is injured or becomes ill through the act or neglect of another party and recovers money from the other parties insurance company and/or their own insurance, reimbursement must be made to MAMSI Life and Health Insurance Co. for the reasonable cash value of claims paid by MAMSI Life and Health Insurance Co.. Please sign the attached agreement regarding the above statements and return it to MAMSI Life and Health Insurance Co. in the enclosed pre-addressed evelope.

If you should have any questions, please contact me at (301) 360-8768. Thank you for your cooperation in this coordination of benefits matter and for your membership in MAMSI Life and Health Insurance Co. Health Plan.

Sincerely,

/s/ of Jerry Bandler

Karen Perkins
Sr. Subrogation Coordinator
MAMSI Life and Health Insurance Co.

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

Exhibit 6

[image omitted]

December 6, 2000

JOHN STEIN
ATTORNEY AT LAW
111 WEST ST. JOHN ST.
SAN JOSE, CA 95115

RE: Marlene D. Sereboff
M219446706*01
DOI: June 22, 2000

Dear Counsel:

MAMSI Life and Health Insurance Co. has been advised that you have been retained to represent the referenced member in connection with claims for personal injuries which arose through the negligence of a third party.

As stated in the member's healthcare policy, if a member of MAMSI Life and Health Insurance Co. is injured or becomes ill through the act or neglect of another party and recovers money from the third party insurance company and/or their own insurance, reimbursement must be made to MAMSI Life and Health Insurance Co. for the reasonable cash value of the claims paid by MAMSI Life and Health Insurance Co..

This letter is to give written notice of MAMSI Life and Health Insurance Co.'s subrogation lien for medical bills processed on behalf of our member. The current amount of our lien is identified on the attached Summary of Paid Claims. This amount will be updated as additional claims are processed.

MAMSI Life and Health Insurance Co. would like to offer you the opportunity to assert our lien and will agree to a contingency fee arrangement as long as it does not exceed one fourth of the amount recovered for MAMSI Life and Health Insurance Co..

If you are willing to proceed under the terms of this agreement, please sign the enclosed agreement and return it in the pre-addressed envelope by December 20, 2000. Your immediate attention is requested, otherwise we will be compelled to retain counsel to pursue recovery of our lien and will not be responsible for any portion of the member's attorney fees.

Sincerely,

/s/ of Jerry Bandler

Karen Perkins
Sr. Subrogation Coordinator
(301) 360-8768

Encl. cc: Marlene D. Sereboff

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

Exhibit 7

[image omitted]

December 6, 2000

JOHN STEIN
ATTORNEY AT LAW
111 WEST ST. JOHN ST.
SAN JOSE, CA 95115

Re: Marlene D. Sereboff
Member Number: M219446706*01
Date of Accident: June 22, 2000

Dear Sir/Madam:

We have updated our subrogation lien on the referenced case to include additional claims processed since the original claim summary mailed to you on October 18, 2000.

The current subrogation lien amount is $70,180.46.

Please advise this office when there is a change in the status of this case which would affect our subrogation lien. I can be reached at (301) 360-8768.

Sincerely,

/s/

Karen Perkins
Sr. Subrogation Coordinator

Enclosure
cc: Marlene D. Sereboff

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

Exhibit 8
[image omitted]

December 6, 2000

Marlene D. Sereboff
2215 Millridge Rd
OWINGS MILLS, MD 21117

RE: Marlene D. Sereboff
M219446706*01

Dear Ms. Sereboff:

Our office has been informed that the above MAMSI Life and Health Insurance Co. member was involved in an accident on June 22, 2000. To date, we have processed a total of $70,180.46 in medical bills resulting from this accident. If additional medical bills received and/or approved after the date of this letter, the above stated amount is subject to increase.

As stated in your Evidence of Coverage, if a member of MAMSI Life and Health Insurance Co. is injured or becomes ill through the act or neglect of another party and recovers money from the other parties insurance company and/or their own insurance, reimbursement must be made to MAMSI Life and Health Insurance Co. for the reasonable cash value of claims paid by MAMSI Life and Health Insurance Co.. Please sign the attached agreement regarding the above statements and return it to MAMSI Life and Health Insurance Co. in the enclosed pre-addressed envelope.

If you should have any questions, please contact me at (301) 360-8768. Thank you for your cooperation in this coordination of benefits matter and for your membership in MAMSI Life and Health Insurance Co. Health Plan.

Sincerely,

/s/

Karen Perkins
Sr. Subrogation Coordinator
MAMSI Life and Health Insurance Co.

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

Exhibit 9

MESSAGE CONFIRMATION

12/06/00 10:40

ID=COB SIU/SUBRO/AVOID

DATE 12/06
S.R.-TIME 02'53
DISTANT STATION ID
4082987503

MODE
CALLING

PAGES 08

RESULT
OK 0000

12/06/00 10:36 COB SIU/SUBRO/AVOID
→914082987503 NO. 410 001

P.O. Box 935
Frederick, Maryland 21705
Phone: 301/360-8095
800/806-3242
Fax: 301/360/8970
301/360-8971
301/360-8973

Mid Atlantic Medical
Services, Inc.

Fax
To: Mr. John Stein From: Karen Perkins
@ 301-360-8768

Fax: 408-298-7503 Date: 12/6/00
Phone: Pages: 8 (including cover sheet)
Re: CC:
☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply
☐ Please Recycle

Confidentiality Notice: The documents accompanying this telecopy transmission contain confidential information belonging to the sender that is legally privileged. This information is intended only at the use of the individual or entity named above. The authorized recipient of this information is prohibited from disclosing this information to

[next page]

P.O. Box 935
Frederick, Maryland 21705
Phone: 301/360-8095
800/806-3242
Fax: 301/360/8970
301/360-8971
301/360-8973

Mid Atlantic Medical Services, Inc.

Fax
To: Mr. John Stein From: Karen Perkins
@ 301-360-8768
Fax: 408-298-7503 Date: 12/6/00
Phone: Pages: 8 (including cover sheet)
Re: CC:
☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply
☐ Please Recycle

Confidentiality Notice: The documents accompanying this telecopy transmission contain confidential information belonging to the sender that is legally privileged. This information is intended only at the use of the individual or entity named above. The authorized recipient of this information is prohibited from disclosing this information to any other party and is required to destroy the information after its stated need has been fulfilled.

If you hare not the intended recipient, you are hereby notified that any disclosure, copying, distribution or action taken in reliance on the contents of these documents is strictly prohibited. If you have received this telecopy in error, please notify the sender immediately to arrange for return of these documents.

• Comments:

Lorraine,

Please have attorney sign and return lien to 301-360-8970. Also please complete the MUA Info. Form.

Karen

Exhibit 10

[image omitted]

April 13, 2001

JOHN STEIN
ATTORNEY AT LAW
111 WEST ST. JOHN ST.
SAN JOSE, CA 95115

Re: Marlene D. Sereboff
Member Number: M219446706*01
Date of Accident: June 22, 2000

Dear Sir/Madam:

We have updated our subrogation lien on the referenced case to include additional claims processed since the original claim summary mailed to you on October 18, 2000.

The current subrogation lien amount is $72,317.35.

Please advise this office when there is a change in the status of this case which would affect our subrogation lien. I can be reached at (877) 288-0266.

Sincerely,

/s/

Karen Perkins
Litigation Analyst ext. 3937

Enclosure

cc: Marlene D. Sereboff

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

Exhibit 11

[image omitted]

April 13, 2001

JOHN STEIN
ATTORNEY AT LAW
111 WEST ST. JOHN ST.
SAN JOSE, CA 95115

Re: Marlene D. Sereboff, M219446706*01

Dear Counsel:

You shall please consider this letter a formal demand by MAMSI Life and Health Insurance Co., that your client Marlene D. Sereboff, cooperate with MAMSI Life and

Health Insurance Co. as required by her health benefit contract. Her failure to immediately cooperate will leave MAMSI Life and Health Insurance Co. with no choice but to seek alternate methods for protecting its rights.

We have received information which indicates that Marlene D. Sereboff was injured as a result of an automobile accident involving a third party on or about June 22, 2000; as a result of that accident, MAMSI Life and Health Insurance Co. has paid benefits on behalf of Marlene D. Sereboff. Further, we have reason to believe that Marlene D. Sereboff intends to recover or attempt to recover from the responsible third party for the injuries she incurred as a result of the accident. The Evidence of Coverage for Marlene D. Sereboff's health benefit plan with MAMSI Life and Health Insurance Co. states that if a member is injured or becomes ill through the act or omissions of a third party and the member ultimately recovers monies for physical injuries from the third party, then MAMSI Life and Health Insurance Co. shall be reimbursed by the member for the reasonable cash value of the benefits which MAMSI Life and Health Insurance Co. has provided. (See Evidence of Coverage as Attachment A).

As stated above, this letter is a formal demand that Marlene D. Sereboff agree to perform pursuant to the provisions of her Evidence of Coverage by endorsing the enclosed lien, Attachment B. If Marlene D. Sereboff fails to promptly sign and return the lien, then she leaves MAMSI Life and Health Insurance Co. with no choice but to conclude that she does not intend to honor the terms of her Evidence of Coverage. As a result, MAMSI Life and Health Insurance Co. shall seek an appropriate alternative means for protecting and asserting its rights.

Please give this matter your prompt attention.

Very truly yours,

Karen Perkins
Litigation Analyst ext. 3937
(877) 288-0266
April 13, 2001

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

[next page]
[image omitted]

Marlene D. Sereboff
2215 Millridge Rd
OWINGS MILLS, MD 21117

Re: Marlene D. Sereboff, M219446706*01

Dear Marlene D. Sereboff:

You shall please consider this letter a formal demand by MAMSI Life and Health Insurance Co., that your client Marlene D. Sereboff, cooperate with MAMSI Life and Health Insurance Co. as required by her health benefit contract. Her failure to immediately cooperate will leave

MAMSI Life and Health Insurance Co. with no choice but to seek alternate methods for protecting its rights.

We have received information which indicates that Marlene D. Sereboff was injured as a result of an automobile accident involving a third party on or about June 22, 2000; as a result of that accident, MAMSI Life and Health Insurance Co. has paid benefits on behalf of Marlene D. Sereboff. Further, we have reason to believe that Marlene D. Sereboff intends to recover or attempt to recover from the responsible third party for the injuries she incurred as a result of the accident. The Evidence of Coverage for Marlene D. Sereboff's health benefit plan with MAMSI Life and Health Insurance Co. states that if a member is injured or becomes ill through the act or omissions of a third party and the member ultimately recovers monies for physical injuries from the third party, then MAMSI Life and Health Insurance Co. shall be reimbursed by the member for the reasonable cash value of the benefits which MAMSI Life and Health Insurance Co. has provided. (See Evidence of Coverage as Attachment A).

As stated above, this letter is a formal demand that Marlene D. Sereboff agree to perform pursuant to the provisions of her Evidence of Coverage by endorsing the enclosed lien, Attachment B. If Marlene D. Sereboff fails to promptly sign and return the lien, then she leaves MAMSI Life and Health Insurance Co. with no choice but to conclude that she does not intend to honor the terms of her Evidence of Coverage. As a result, MAMSI Life and Health Insurance Co. shall seek an appropriate alternative means for protecting and asserting its rights.

Please give this matter your prompt attention.

Very truly yours,

/s/

Karen Perkins
Litigation Analyst ext. 3937
(877) 288-0266

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

Exhibit 12

[image omitted]

April 24, 2001

Ms. Karen Perkins
Litigation Analyst
MAMSI
Post Office Box 935
Frederick, Maryland 21705

Re: Marlene D. Sereboff
M219446706*01

Dear Ms. Perkins:

This will acknowledge your letter date April 13, 2001, with reference to Marlene D. Sereboff.

It is my understanding that this coverage was provided through Mrs. Sereboff's employment, The Katzen Eye Group, and as such it was provided in accordance with the terms of the Federal Employers Retirement Income and Security Act (ERISA).

As you may or may not know, the Ninth Circuit has consistently held in four decisions over the last five years that HMO's and other insurance carriers are not permitted to recover subrogation liens within the Ninth Circuit which encompasses California where this accident occurred and where the litigation is pending.

For your information, the cases that cover this issue are Cement Masons Health and Welfare trust Fund for Northern California, et al. v. Raymond Stone, 1999 Daily Journal (9th Cir. 1999) DAR 12453, No. 98-16150, FMC Medical Plan vs. Owens, (9th Cir. 1997) 122 F.3d 1258, Pacificare v. Martin (9th Cir. 1993) 34 F.3d 834, and Reynolds Metals Co. v. Cole, (9th Cir. 2000) 202 F.3d 1246. Therefore, MAMSI may wish to take whatever steps it feels are appropriate to protect its interest. However, in light of the law in California, and in particular the Ninth Circuit, I do not believe that MAMSI is entitled to any reimbursement upon its claims in accordance with the laws in the Ninth Circuit.

I would be happy to discuss this with you after you have had an opportunity review the Points and Authorities which I have supplied to you.

Yours very truly,

THE BOCCARDO LAW FIRM LLP

By /s/
JOHN C. STEIN

JCS:lo
cc: Mrs. Marlene Sereboff

Exhibit 13
[image omitted]

SECOND
May 7 2001
REQUEST

May 7, 2001

JOHN STEIN
ATTORNEY AT LAW
111 WEST ST. JOHN ST.
SAN JOSE, CA 95115

RE: Joel Sereboff
M219446706*02
DOI: June 22, 2000

Dear Counsel:

MAMSI Life and Health Insurance Co. has been advised that you have been retained to represent the referenced member in connection with claims for personal injuries which arose through the negligence of a third party.

As stated in the member's healthcare policy, if a member of MAMSI Life and Health Insurance Co. is injured or becomes ill through the act or neglect of another party and recovers money from the third party insurance company and/or their own insurance, reimbursement must be made to MAMSI Life and Health Insurance Co. for the reasonable cash value of the claims paid by MAMSI Life and Health Insurance Co..

This letter is to give written notice of MAMSI Life and Health Insurance Co.'s subrogation lien for medical bills processed on behalf of our member. The current amount of our lien is identified on the attached Summary of Paid Claims. This amount will be updated as additional claims are processed.

MAMSI Life and Health Insurance Co. would like to offer you the opportunity to assert our lien and will agree to a contingency fee arrangement as long as it does not exceed one fourth of the amount recovered for MAMSI Life and Health Insurance Co..

If you are willing to proceed under the terms of this agreement, please sign the enclosed agreement and return it in the pre-addressed envelope by May 21, 2001. Your immediate attention is requested, otherwise we will be compelled to retain counsel to pursue recovery of our lien and will not be responsible for any portion of the member's attorney fees.

Sincerely,

/s/

Lisa Phelps

Subrogation Coordinator ext. 3933

(877) 288-0266

Encl. cc: Joel Sereboff

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

Exhibit 14

[image omitted]

May 7, 2001

John Stein, Esquire
111 West St. John St.
San Jose, CA 95115

REGARDING: Joel Sereboff
MEMBER NUMBER: M219446706*02
DATE OF LOSS: June 22, 2000

Dear Mr. Stein:

Enclosed you will find an accident information form. Please complete the highlighted areas and return to MAMSI Life & Health Insurance Co. in the return envelope enclosed. Your time and attention to this matter are greatly appreciated. If you have any questions, please feel free to call me at (877) 288-0266 ext. 3933.

Thank you,

/s/

Lisa Phelps
Subrogation Coordinator
MAMSI Life & Health Insurance Co.

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

Exhibit 15

[image omitted]

May 7, 2001

Marlene D. Sereboff
2215 Millridge Rd
OWINGS MILLS, MD 21117

SECOND
MAY 7 2001
REQUEST

RE: Joel Sereboff
M219446706*02

Dear Ms. Sereboff:

Our office has been informed that the above MAMSI Life and Health Insurance Co. member was involved in an accident on June 22, 2000. To date, we have processed a total of $0.00 in medical bills resulting from this accident. If additional medical bills received and/or approved after the date of this letter, the above stated amount is subject to increase.

As stated in your Evidence of Coverage, if a member of MAMSI Life and Health Insurance Co. is injured or becomes ill through the act or neglect of another party and recovers money from the other parties insurance company and/or their own insurance, reimbursement must be made to MAMSI Life and Health Insurance Co. for the reasonable cash value of claims paid by MAMSI Life and Health Insurance Co.. Please sign the attached agreement regarding the above statements and return it to MAMSI Life and Health Insurance Co. in the enclosed pre-addressed evelope.

If you should have any questions, please contact me at (877) 288-0266. Thank you for your cooperation in this coordination of benefits matter and for your membership in MAMSI Life and Health Insurance Co. Health Plan.

Sincerely,

/s/

Lisa Phelps
Subrogation Coordinator ex. 3933
MAMSI Life and Health Insurance Co.

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

[image omitted]

SECOND
MAY 7 2001
REQUEST

Please Return To:

Lisa Phelps
MID ATLANTIC MEDICAL SERVICES INC
Coordination of Benefits
4 Taft Court
Rockville, Maryland 20850

Re: Joel Sereboff
M219446706*02
DOI: June 22, 2000

AGREEMENT CONTRACT

I agree to represent Mid Atlantic Medical Services Inc., in its subrogation claim as stated in our agreement of May 7, 2001.

_____ _____

Attorney (Signature) Date

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

Exhibit 16

[image omitted]

May 23, 2001

John Stein, Esquire
THE BOCCARDO LAW FIRM LLP
111 West St. John St.
11th Floor
San Jose, CA 95115-0001

RE: Marlene Sereboff
Member Number: M219446706*01
Subrogation Lien: $72,317.35

Dear Mr. Stein:

I am in receipt of your letter dated April 24, 2001 concerning the above referenced subrogation lien.

First, I wish to bring to your attention that the Katzen Eye Group is not an ERISA Plan.

Secondly, Ms. Sereboff's health insurance is not an HMO. Ms. Sereboff is insured through MAMSI Life and Health, which is a PPO.

I am again sending you a copy of Ms. Sereboff's Evidence of Coverage booklet and ask that you read Pages 29 and 30 very carefully. It is clear from the contract of health

insurance that this is a Maryland contract and therefore California law does not apply.

According to the contract with Ms. Sereboff MAMSI Life and Health has every right to request a signed lien agreement and benefits may be withheld until the document is provided.

If I do not have a signed lien agreement on or before June 8, 2001, I will have no option but to follow the guidelines outlined in the Evidence of Coverage.

Sincerely,

/s/

Karen S. Perkins
Litigation Analyst
877-288-0266 Ext. 3937

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

Exhibit 17

[image omitted]

May 30, 2001

Ms. Karen Perkins
Litigation Analyst
MAMSI
Post Office Box 935
Frederick, Maryland 21705

Re: Marlene D. Sereboff
M219446706*01
Subrogation Lien: $72,317.35

Dear Ms. Perkins:

Thank you for your letter of May 23, 2001. I do not believe that some of the information contained in your letter is correct but you and I are not going to resolve this issue through exchange of correspondence.

If you believe that MAMSI is entitled to collect monies out of this litigation, I would suggest that you retain counsel in California to protect your interests since under California law I do not believe that I can represent MAMSI and my client at the same time.

At this point, the discussion is academic because no recovery has been had on this lawsuit at this time.

If you believe strongly that you are entitled to this reimbursement, then the lawyer who you retain would be able to protect your interests in litigation here in California and could negotiate separately with the defendants for reimbursement of all monies paid by you. I think that would be the reasonable solution under the circumstances.

If I can be of further assistance to you, please don't hesitate to call me.

Yours very truly,
THE BOCCARDO LAW FIRM
LLP
By /s/
JOHN C. STEIN

JCS:lo

Exhibit 18

[image omitted]

June 7, 2001

Ms. Karen Perkins
Litigation Analyst
MAMSI
Post Office Box 935
Frederick, Maryland 21705

Re: Marlene D. Sereboff
M219446706*01
Subrogation Lien: $72,317.35

Dear Ms. Perkins:

Following your verbal request of June 7, 2001, I am enclosing a copy of the Sereboff complaint.

Very truly yours,

THE BOCCARDO LAW FIRM
LLP
BY: /s/
JOHN C. STEIN

JCS/drs

Exhibit 19

[image omitted]

June 28, 2001

Ms. Lisa Phelps
Subrogation Coordinator
MAMSI
Post Office Box 935
Frederick, Maryland 21705

Re: Joel Serebof
M219446706*02

Dear Ms. Phelps:

Enclosed you will find copies of letters dated April 24, May 30 and June 7, 2001, sent to Karen Perkins in your office concerning MAMSI's position with regard to Marlene Sereboff. We maintain the same position with regard to any claims you may have with regard to Joel Sereboff.

If you need additional information, please do not hesitate to give me a call.

Yours very truly,
THE BOCCARDO LAW FIRM
LLP
By /s/
JOHN C. STEIN

JCS:lo
Encls.

Exhibit 20

[image omitted]

October 17, 2001

JOHN STEIN
ATTORNEY AT LAW
111 W. ST. JOHN STREET
SAN JOSE, CA 95115

RE: Marlene D. Sereboff
Member Number: M219446706*01
DOA: June 22, 2000

Dear Sir/Madam:

Please be advised that we are reviewing our subrogation file on the above referenced member. We have not processed any additional claims since our last update. Our lien remains at $72,929.86.

Please advise this office when there is a change in the status of the case which could affect our subrogation lien.

Once the case settles, please make a check payable to MAMSI Life and Health Insurance Co. for our lien balance. Please include the member number on the check to ensure the account is credited properly.

If you have any questions, please contact me at (877) 288-0266.

Sincerely,

/s/
Karen Perkins
Litigation Analyst ext. 3937

Enclosure

cc: Marlene D. Sereboff

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

[next page]
[image omitted]

December 17, 2001

JOHN STEIN
ATTORNEY AT LAW
111 W. ST. JOHN STREET
SAN JOSE, CA 95115

RE: Marlene D. Sereboff
Member Number: M219446706*01
DOA: June 22, 2000

Dear Sir/Madam:

Please be advised that we are reviewing our subrogation file on the above referenced member. We have not

processed any additional claims since our last update. Our lien remains at $72,929.86.

Please advise this office when there is a change in the status of the case which could affect our subrogation lien.

Once the case settles, please make a check payable to MAMSI Life and Health Insurance Co. for our lien balance. Please include the member number on the check to ensure the account is credited properly.

If you have any questions, please contact me at (877) 288-0266.

Sincerely,

/s/

Karen Perkins
Litigation Analyst ext. 3937

Enclosure

cc: Marlene D. Sereboff

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

Exhibit 21

[image omitted]

February 22, 2002

JOHN STEIN
ATTORNEY AT LAW
111 W. ST. JOHN ST
SAN JOSE, CA 95115

RE: Joel Sereboff
Member Number: M219446706*02
DOA: June 22, 2000

Dear Sir/Madam:

We have updated our subrogation lien on the referenced case to include additional claims processed since the original claim summary mailed to you on October 18, 2000.

The current subrogation lien amount is $1,091.11.

Please advise this office when there is a change in the status of this case which would affect our subrogation lien. I can be reached at (877) 288-0266.

Sincerely,

/s/

Karen Perkins
Litigation Analyst ext. 3937

Enclosure

cc: Joel Sereboff

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

Exhibit 22

[image omitted]

April 25, 2002

John Stein
Attorney At Law
111 West St. John Street
San Jose, CA 95115

RE:	Member:	Marlene Sereboff
	Member Number:	M219446706*01
	Date of Incident:	6-22-00

Dear Sir/Madam:

Please be advised that we are reviewing our subrogation file on the above referenced member.

We have not processed any additional claims since our last update. Our lien remains at $73,778.26.

Please advise this office when there is a change in the status of the case, which could affect our subrogation lien.

Once the case reaches settlement, please make a check payable to MAMSI for our lien balance. Please include the member number on the check to ensure the account is credited properly.

If you have any questions, please contact me at 877-288-0266 Ext. 3937.

Sincerely,

/s/

Karen S. Perkins
Litigation Analyst

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

[next page]

[image omitted]

JUNE 25, 2002

JOHN STEIN
111 W. ST. JOHN STREET
SAN JOSE, CA 95115

RE: Member Name: MARLENE D. SEREBOFF
Member Number: M219446706*01
Date of Loss: 6/22/00

Dear Sir/Madam:

Please be advised that we are reviewing our subrogation file on the above referenced member.

We have not processed any additional claims since our last update. Our lien remains at $73,778.26.

Please advise this office when there is a change in the status of the case, which could affect our subrogation lien.

Once the case reaches settlement, please make a check payable to MAMSI Life and Health Insurance Company (MLH) for our lien balance. Please include the member number on the check to ensure the account is credited properly.

If you have any questions, please contact me at (877) 288-0266.

Sincerely,

/s/

Karen Perkins

Litigation Analyst ext. 3937

[next page]

[image omitted]

August 22, 2002

John Stein

Attorney At Law

111 West St. John's Street

San Jose, CA 95115

RE: Member: Marlene Sereboff
Member Number: M219446706*01
Date of Incident: 6-22-00

Dear Sir/Madam:

Please be advised that we are reviewing our subrogation file on the above referenced member.

We have not processed any additional claims since our last update. Our lien remains at $73,778.26.

Please advise this office when there is a change in the status of the case, which could affect our subrogation lien.

Once the case reaches settlement, please make a check payable to MAMSI for our lien balance. Please include the member number on the check to ensure the account is credited properly.

If you have any questions, please contact me at 877-288-0266 Ext. 3937.

Sincerely,

/s/

Karen S. Perkins
Litigation Analyst

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

[image omitted]

MARCH 12, 2003

JOHN STEIN
111 W. ST. JOHN STREET
SAN JOSE, CA 95115

RE: Member Name: MARLENE D. SEREBOFF
Member Number: M219446706*01
Date of Loss: 6/22/00

Dear Sir/Madam:

Please be advised that we are reviewing our subrogation file on the above referenced member.

We have not processed any additional claims since our last update. Our lien remains at $73,778.26.

Please advise this office when there is a change in the status of the case, which could affect our subrogation lien.

Once the case reaches settlement, please make a check payable to MAMSI Life and Health Insurance Company (MLH) for our lien balance. Please include the member number on the check to ensure the account is credited properly.

If you have any questions, please contact me at (877) 288-0266.

Sincerely,

/s/

Andrea Hrycenko
Sr. Subrogation Coordinator ext. 3929

Exhibit 23
[image omitted]

May 24, 2002

John Stein
Attorney At Law
111 West St. John Street
San Jose, CA 95115

RE:	Member:	Joel Sereboff
	Member Number:	M219446706*02
	Date of Incident:	6-22-00

Dear Sir/Madam:

Please be advised that we are reviewing our subrogation file on the above referenced member.

We have not processed any additional claims since our last update. Our lien remains at $1,091.11,

Please advise this office when there is a change in the status of the case, which could affect our subrogation lien.

Once the case reaches settlement, please make a check payable to MAMSI for our lien balance. Please include the member number on the check to ensure the account is credited properly.

If you have any questions, please contact me at 877-288-0266 Ext. 3937.

Sincerely,

/s/

Karen S. Perkins
Litigation Analyst

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

[next page]
[image omitted]

August 22, 2002

John Stein
Attorney At Law
111 West St. John's Street
San Jose, CA 95115

RE:	Member:	Joel Sereboff
	Member Number:	M219446706*02
	Date of Incident:	6-22-00

Dear Sir/Madam:

Please be advised that we are reviewing our subrogation file on the above referenced member.

We have not processed any additional claims since our last update. Our lien remains at $1,091.11,

Please advise this office when there is a change in the status of the case, which could affect our subrogation lien.

Once the case reaches settlement, please make a check payable to MAMSI for our lien balance. Please include the member number on the check to ensure the account is credited properly.

If you have any questions, please contact me at 877-288-0266 Ext. 3937.

Sincerely,

/s/

Karen S. Perkins
Litigation Analyst

P.O. Box 935 • Frederick, Maryland 20705 • (301) 360-8095 • Fax: (301) 360-8970
Corporate address: 4 Taft Court • Rockville, Maryland 20850
www.mamsi.com

[next page]

[image omitted]

MARCH 12, 2003

JOHN STEIN
111 W. ST. JOHN STREET
SAN JOSE, CA 95115

RE: Member Name: JOEL SEREBOFF
Member Number: M219446706*02
Date of Loss: 6/22/00

Dear Sir/Madam:

Please be advised that we are reviewing our subrogation file on the above referenced member.

We have not processed any additional claims since our last update. Our lien remains at $1,091.11,

Please advise this office when there is a change in the status of the case, which could affect our subrogation lien.

Once the case reaches settlement, please make a check payable to MAMSI Life and Health Insurance Company (MLH) for our lien balance. Please include the member number on the check to ensure the account is credited properly.

If you have any questions, please contact me at (877) 288-0266.

Sincerely,

/s/

Andrea Hrycenko
Sr. Subrogation Coordinator ext. 3929

Exhibit 24

[image omitted]

MARCH 12, 2003

JOEL SEREBOFF
2215 Millridge Rd.
OWINGS MILLS, MD 21117

RE: Member Name: JOEL SEREBOFF
Member Number: M219446706*02
Date of Loss: 6/22/00

Dear Sir/Madam:

Please be advised that we are reviewing our subrogation file on the above referenced member.

We have not processed any additional claims since our last update. Our lien remains at $1,091.11,

Please advise this office when there is a change in the status of the case, which could affect our subrogation lien.

Once the case reaches settlement, please make a check payable to MAMSI Life and Health Insurance Company (MLH) for our lien balance. Please include the member number on the check to ensure the account is credited properly.

If you have any questions, please contact me at (877) 288-0266.

Sincerely,

/s/
Andrea Hrycenko
Sr. Subrogation Coordinator ext. 3929

Exhibit 25
[image omitted]

MARCH 12, 2003

MARLENE D. SEREBOFF
2215 Millridge Rd.
OWINGS MILLS, MD 21117

RE: Member Name: MARLENE D. SEREBOFF
Member Number: M219446706*01
Date of Loss: 6/22/00

Dear Sir/Madam:

Please be advised that we are reviewing our subrogation file on the above referenced member.

We have not processed any additional claims since our last update. Our lien remains at $73,778.26.

Please advise this office when there is a change in the status of the case, which could affect our subrogation lien.

Once the case reaches settlement, please make a check payable to MAMSI Life and Health Insurance Company (MLH) for our lien balance. Please include the member number on the check to ensure the account is credited properly.

If you have any questions, please contact me at (877) 288-0266.

Sincerely,

/s/

Andrea Hrycenko

Sr. Subrogation Coordinator ext. 3929

Exhibit 26

[image omitted]

March 20, 2003

Andrea Hrycenko
MAMSI
P.O. Box 935
Frederick, MD 21705

RE:Member Name:Marlene Sereboff/Joel Sereboff
Member Number:M219446706*01/ M219446706*02
Date of Loss: 6/22/00

Dear Ms. Hrycenko:

This will acknowledge your letter dated March 12, 2003 with reference to Marlene and Joel Sereboff.

It is my understanding that this coverage was provided through Mrs. Sereboff's employment, and as such it was provided in accordance with the terms of the Federal Employers Retirement Income and Security Act (ERISA).

As you may or may not know, the Ninth Circuit Court of Appeals has rendered four decisions in the last several years in which they have uniformly held that insurance carriers covered by ERISA are not permitted to recover subrogation liens, the difference between what the hospital or physician normally charges and the amount that the insurance carrier pays.

For your information, the cases that cover this issue are: Reynolds Metals Co. vs. Cole, (9th Cir. 2000) 202 F.3d 1246, Cement Masons Health and Welfare Trust Fund for Northern California, et al. vs. Raymond Stone, (9th Cir. 1999) 197 F.3d 1003, FMC Medical Plan vs. Owens (9th Cir. 1997) 122 F.3d 1258, and Pacificare vs. Martin (9th Cir. 1993) 34 F.3d 834.

On January 9, 2002, the United States Supreme Court handed down a decision entitled Great-West Life & Annuity Insurance Company v. Janette Knudson, (2002) 122 S. Ct. 708, in which it affirmed the Ninth Circuit Ruling that the medical insurance carrier for Mrs. Knudson was not permitted to recover the medical lien because it was in essence an action for money damages which is not permitted under ERISA Section 502(a)(3).

Finally, on August 15, 2002, the Ninth Circuit Court of Appeals was again asked to examine the

collectibility of medical liens in the case of Westaff (USA) Inc. v. Betty Arce, (2002) 298 F.3d 1164, and held that the Supreme Court holding cited above absolutely prohibits the recovery of any liens or subrogation claims that the providers may have if they in fact have accepted ERISA insurance company payments.

The Federal Law preempts any collection statutes, particularly those dealing with ERISA programs, and it is my opinion that MAMSI is not entitled to receive any reimbursement upon its claims in accordance with the decisions of the Ninth Circuit and the United States Supreme Court.

If you have any further questions after you have reviewed the above cases, I would happy to discuss this matter futher.

Very truly yours,
THE BOCCARDO LAW FIRM LLP

BY:
JOHN C. STEIN

JCS/tcg

cc: Joel and Marlene Sereboff

Exhibit 27

JOHN R. WILLIAMS (CA Bar No. 038391)
MEDIATOR
110 North Third Street
San Jose, California 95112
Telephone: (408) 288-3868
Facsimile: (408) 288-3860

(ENDORSED)
FILED
JAN 24 03
UNITED STATES
OFFICER / CLERK
SUPERIOR COURT
OF CA
COUNTY OF
SANTA CLARA
By_____DEPUTY
E.R. Hernandez Spitters

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

JOEL & MARLENE SEREBOFF, et al. Plaintiff, vs. CHARLES E. ROEDERER, et al., Defendants.	NO. CV791810 NOTICE OF SETTLEMENT THROUGH MEDIATION UNDER LOCAL RULE 1.11.11 AND CRC 225(a)

The parties having stipulated to Mediation in lieu of Judicial Arbitration, the above-captioned matter was mediated as scheduled on August 26, 2002, October 2, 2002 and January 20, 2003. Jack Stein represented the

plaintiffs, JOEL & MARLENE SEREBOFF, who were present throughout the Third Mediation. Donald J. Roberts represented defendants, LANCASTER COLONY CORPORATION and CHARLES E. ROEDERER. Defendant's claims representative, Ryan Greenup of Liberty Mutual Group was present throughout the mediations. Kenneth C. Ward represented defendants, QUAPAW CONSTRUCTION, AVIS RENT-A-CAR SYSTEMS, and HERTZ CORPORATION at the First Mediation and Second Mediation. Scott W. O'Neill represented defendant/cross-defendant/cross-complainant, DOLLAR RENT A CAR SYSTEMS, INC. at the First Mediation and Second Mediation. Thomas McGraff/Ms. Terry Rogan represent BLUNK DEMATTEI ASSOCIATES and were present at the First, Second and Third Mediations respectively. Martin Snyder represented defendants, ENTERPRISE, KRA ENTERPRISES, INC., dba PAYLESS RENT A CAR, SAN RAMON CARRIAGE dba THRIFTY, FOX RENT A CAR and CITY OF SANE JOSE. Defendants' claim representative, Sarah M. Rapolas, of St. Paul Property and Liability Insurance was present through the First and Second Mediations. Stan Linker represented K&G ARCHITECTS and was present at all sessions. Jim Pyle, Claims Representative for DPIC was present during the first two sessions of mediation.

PLEASE TAKE NOTICE that the above-captioned matter has settled in full through Mediation. A Request for Dismissal with prejudice will be signed and filed.

Dated: January 23, 2003

By: /s/

JOHN R. WILLIAMS

ATTORNEY/MEDIATOR

Seberboff v. Roederer
Santa Clara Superior Court No. CV 791810

(ENDORSED)
FILED
JAN 24 03

PROOF OF SERVICE

I am employed in the County of Santa Clara, State of California. I am over the age of eighteen years and not a party to the within action. My business is North Third Street, San Jose, CA 95112.

On the date set forth below, I served the following documents:

Notice of Settlement Through Mediation Under Local Rule 1.11.11 and CRC 225(a)

On the interested parties to said action by the following means:

[X] (BY MAIL) By placing at true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, for collection and mailing on that date following ordinary business practices, in the United States Mail at the offices of Williams, Pinelli & Cullem, LLP, San Jose, CA addressed as shown below. I am readily familiar with this business's practice for collection and process of correspondence for mailing with the U.S. Postal Service the same day it was placed for collection and processing.

[ ] (By HAND-DELIVERY) By causing a true copy thereof, enclosed in a sealed envelope, to be delivered by hand to the address(es) shown below.

[ ] (BY FACSIMILE TRANSMISSION) By transmitting a true copy thereof by facsimile transmission from facsimile number (408) 288-3860

to the interested parties to said action at the facsimile number(s) shown below.

I declare under penalty of perjury under the laws of the United States of California that the foregoing is true and correct.

Executed on January 23, 2003 at San Jose, California.

/s/

MILLI ABRAHAM

NAMES(S) AND ADDRESS(ES) OR FAX NUMBER(S) OF EACH PARTY SERVED:

John C. Stein
The Boccardo Law Firm LLP
Post Office Box 15001
San Jose, CA 95115-0001

Donald J. Roberts
Winningham, Roberts, Fama & Kramer
One Front Street, Suite 500
San Francisco, CA 94111

Scott W. O'Neill
O'Neill & Marchiando
5 Hutton Centre Drive, Suie 1120
Santa Ana, CA 92707

Martin Snyder
Snyder, Corenlius & Hunter
399 Taylor Boulevard, Suite 106
Pleasant Hill, CA 94523

Terry Rogan
Hanson Bridgett
339 Market Street, 23rd Floor
San Francisco, CA 94105-2173

Stan Linker
Kennedy, Archer & Harray
24591 Silver Cloud Court, #200
Monterey, CA 93940

Kenneth C. Ward
Luanne Rutherford
Archer, McComas, Breslin, et al.
Post Office Box 8035
2033 North Main Street, Suite 800
Walnut Creek, CA 94596

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

MID ATLANTIC MEDICAL SERVICES, INC.,	
Plaintiff	
v.	
JOEL SEREBOFF, MARLENE SEREBOFF, JOHN STEIN AND THE BOCCARDO LAW FIRM, LLP,	Case No.1:03-cv-02269-AMD
Defendants	

PLAINTIFF'S MOTION FOR CONTEMPT

Plaintiff, Mid Atlantic Medical Services, Inc. ("MAMSI"), moves the Court, pursuant to Fed. R. Civ. Proc. 70, to hold Defendants, Joel and Marlene Sereboff (the "Sereboffs"), in contempt of this Court's January 26, 2004, order and order the Sereboffs to pay over monies to MAMSI or its counsel as MAMSI's designee in compliance with this Court's January 26, 2004, order or show cause why they should not be held in contempt. This Court's order dated January 26, 2004, required the Sereboffs to pay over to MAMSI or its counsel as MAMSI's designee, the principal sum of $74,869.37, together with interest at the legal rate of six percent per annum dating from March 12, 2003, provided that such payment shall be reduced by the amount calculated

according to part 4 of this Court's order. The order required that the Sereboffs pay over these monies by February 9, 2004, and they have failed to do so. MAMSI contemporaneously submits a memorandum in support of its motion.

Respectfully submitted,

[Local Counsel] /s/ Michelle Stawinski
Michelle Stawinski
Bouland & Brush, LLC
201 N. Charles Street, Suite 2400
Baltimore, Maryland 21201-4108
Telephone: (410) 752-6000
Facsimile: (410) 625-3859

[Lead Counsel] /s/ Thomas H. Lawrence
Thomas H. Lawrence
LAWRENCE & RUSSELL, LLP
5050 Poplar Avenue, Suite 1717
Memphis, Tennessee 38157
Telephone: (901) 844-4430
Facsimile: (901) 844-4435

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

MID ATLANTIC MEDICAL SERVICES, INC.,	
Plaintiff	
v.	
JOEL SEREBOFF, MARLENE SEREBOFF, JOHN STEIN AND THE BOCCARDO LAW FIRM, LLP,	Case No.1:03-cv-02269-AMD
Defendants	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR CONTEMPT

Plaintiff, Mid Atlantic Medical Services, Inc. ("MAMSI"), submits this memorandum in support of its motion for contempt order as to Joel Sereboff and Marlene Sereboff (the "Sereboffs").

On January 26, 2004, this Court granted MAMSI's motion for summary judgment in part and denied it in part.[1] Additionally, on January 26, 2004, this Court ordered the Sereboffs to pay over to MAMSI or its counsel as MAMSI's designee, the principal sum of $74,869.37,

[1] *See* January 26, 2004, Declaratory Judgment and Order attached hereto as Exhibit A.

together with interest at the legal rate of six percent per annum dating from March 12, 2003, provided that such payment shall be reduced by the amount calculated according to part 4 of this Court's order.[2]

The order required that the Sereboffs pay over these monies by February 9, 2004; however, they have failed to do so, and therefore, they are in violation of this Court's order.[3]

ARGUMENT AND AUTHORITIES

If a judgment directs a party to perform a specific act and the party fails to comply with the order, this Court may - even if the party has appealed – compel obedience to the judgment:

> We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal.

Maness v. Meyers, 419 U.S. 449, 458 (1975).

Although the Sereboffs filed a Notice of Appeal on February 24, 2004, the Sereboffs failed to file a motion to stay this Court's January 26, 2004.[4] Currently, the Sereboffs are in violation of this Court's order and were in violation of this Court's order as early as February 9, 2004, at least 14 days prior to filing their notice of appeal.

CONCLUSION

For the foregoing reasons, MAMSI respectfully requests the Court grant its motion and order the Sereboffs to turn over $53,293.37 to MAMSI within seven days of

---

[2] *Id.*.

[3] *Id.*; *see also* Affidavit of Thomas H. Lawrence attached hereto as Exhibit B.

[4] *See* Notice of Appeal filed by the Sereboffs on February 24, 2004.

the date of this order or else be fined $1,000.00 per day until they comply with this Court's January 26, 2004, order.

Respectfully submitted,

[Local Counsel] /s/ Michelle Stawinski
Michelle Stawinski
Bouland & Brush, LLC
201 N. Charles Street, Suite 2400
Baltimore, Maryland 21201-4108
Telephone: (410) 752-6000
Facsimile: (410) 625-3859

[Lead Counsel] /s/ Thomas H. Lawrence
Thomas H. Lawrence
LAWRENCE & RUSSELL, LLP
5050 Poplar Avenue, Suite 1717
Memphis, Tennessee 38157
Telephone: (901) 844-4430
Facsimile: (901) 844-4435

CERTIFICATE OF SERVICE

I hereby certify that I have this the 17th day of March, 2004, served a copy of the foregoing on by mailing said copies by first class, U.S. mail, postage prepaid, addressed as follows:

John C. Stein
THE BOCCARDO LAW FIRM LLP
111 West St. John Street
Eleventh Floor

P.O. Box 15001
San Jose, California 95115-0001

/s/ Thomas H. Lawrence

FILED
JAN 19 2006
OFFICE OF THE CLERK

No. 05-260

In The

Supreme Court of the United States

JOEL SEREBOFF and MARLENE SEREBOFF,

Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

SHAUN P. MARTIN
UNIVERSITY OF SAN DIEGO SCHOOL OF LAW
5998 Alcalá Park
San Diego, CA 92110

WILLIAM DELGADO
JASON H. WILSON
WILLENKEN WILSON LOH & LIEB LLP
707 Wilshire Blvd.
Los Angeles, CA 90017

PETER K. STRIS
Counsel of Record
RADHA A. PATHAK
WHITTIER LAW SCHOOL
3333 Harbor Blvd.
Costa Mesa, CA 92626
(714) 444-4141; x 460

JOHN C. STEIN
THE BOCCARDO LAW FIRM LLP
111 W. St. John St.; Ste. 400
San Jose, CA 95113

**additional counsel listed on inside cover*

Counsel for Petitioners

ALISON L. LACROIX
SAMUEL I. GOLIEB FELLOW
IN LEGAL HISTORY
NEW YORK UNIVERSITY
SCHOOL OF LAW
40 Washington Square S.
New York, NY 10012

QUESTION PRESENTED

Can a plan fiduciary bring a civil action against a plan participant to obtain "appropriate equitable relief" under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(3), where a term of the plan requires the participant to reimburse medical expenses advanced by the plan if the participant recovers money from a third-party tortfeasor and possesses such payments in an identifiable fund?

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A. Corbin, Contracts (1964).....15

D. Dobbs, Law of Remedies (2d ed. 1993)..... *passim*

Other Authorities

Roger M. Baron, *Public Policy Considerations Warranting Denial Of Reimbursement To ERISA Plans: It's Time To Recognize The Elephant In The Courtroom*, 55 Mercer L. Rev. 595 (2004).....28, 32, 34

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John P. Dawson, *Restitution or Damages?* 20 Ohio St. L.J. 175 (1959).....23

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Malcolm D. Talbott, *Restitution Remedies in Contract Cases: Finding a Fiduciary or Confidential Relationship to Gain Remedies*, 20 Ohio St. L.J. 320 (1959).....9

Comment, Legal Reimbursement Claims by ERISA Plan Fiduciaries, 72 U. Chi L. Rev. 103 (2005) 27

Note, *Adding Insult to Injury, ERISA, Knudson, and the Error of the Possession Theory*, 89 Minn. L. Rev. 1214 (2005) 26

Briefs

Brief of *Amicus Curiae* in Support of the Judgment Below by Invitation of the Court, 2001 WL 740878, filed in *Great-West Life & Annuity Insurance v. Knudson*, 534 U.S. 204 (2002).....31

BRIEF FOR PETITIONERS

Petitioners Joel and Marlene Sereboff respectfully request that the judgment of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") be reversed.

OPINIONS BELOW

The opinion of the Fourth Circuit (PA 1a-19a)[1] is published at 407 F.3d 801. The order of the district court granting summary judgment in favor of respondents (PA 24a-45a) is published at 303 F. Supp. 2d 691. The order of the district court granting attorneys' fees (PA 20a-23a) is published at 316 F. Supp. 2d 265. The order denying a timely petition for rehearing and suggestion for rehearing *en banc* (PA 46a-47a) is unreported.

STATEMENT OF JURISDICTION

The Fourth Circuit denied a timely petition for rehearing and suggestion for rehearing *en banc* on June 1, 2005. A petition for a writ of certiorari was granted on November 28, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 502 of the Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. § 1132, as amended, provides in relevant part:

---

[1] References to "PA ----" are to the appropriate pages of the appendix to the petition for a writ of certiorari. References to "JA ---" are to the appropriate pages of the Joint Appendix.

(a) Persons empowered to bring a civil action.

A civil action may be brought—

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan; . . . .

* * * *

STATEMENT OF THE CASE

At all times relevant to this action, petitioners Joel and Marlene Sereboff (hereinafter "Petitioners" or the "Sereboffs") have been participants in the MAMSI Life and Health Insurance PPO Plan (hereinafter, the "Plan"). PA 36a-37a ¶¶1, 8. The Plan is a self-funded employee welfare benefit plan covered by the Employee Retirement Income Security Act of 1974 (hereinafter, "ERISA"). PA 37a ¶9. It is administered by fiduciary Mid Atlantic Medical Services, Inc. (hereinafter, "MAMSI") and sponsored by Ms. Sereboff's employer. PA 36a ¶¶1, 3.

I. The Accident and Plan Payments.

On June 22, 2000, the Sereboffs were injured in an automobile accident in California. PA 36a ¶¶4, 5. In connection with the injuries suffered by the Sereboffs in this accident, the Plan advanced a total of $74,869.37 to cover the medical expenses for their accident-related injuries. PA 37a ¶10.

The Plan contains an "Acts of Third Parties" provision, which states in part:

> This subrogation provision applies when you are sick or injured as a result of the act or omission of another person or party. Subrogation means the Company's right to recover any payments made to you [] by a third party. . . because of an injury or illness caused by a third party. . . . If you [] receive[] benefits and have a right to recover damages from a third party, the Company is subrogated to this right. All recoveries from a third party [] must be used to reimburse the Company.

The provision is set forth in its entirety at PA 38a-39a ¶11 and JA 35-36, and JA 74-75.

II. The State Court Tort Lawsuit and Settlement.

On August 11, 2000, the Sereboffs filed a personal injury lawsuit in California against various third-parties. PA 39a, ¶12; JA 77-86 (the complaint).

On October 18, 2000, the Sereboffs' trial counsel, Jack Stein, received two form letters from MAMSI. JA 87-90. These letters—one regarding each of the Sereboffs—stated that:

> MAMSI [ ] has been advised that you have been retained to represent the referenced member in connection with claims for personal injuries which arose through the negligence of a third party. . . . This letter is to give written notice of MAMSI[]'s subrogation lien for medical bills processed on behalf of our member. . . . MAMSI [] would like to offer you the opportunity to assert our lien. . . . Your immediate attention is requested, *otherwise we will be compelled to retain counsel to pursue recovery of our lien. . .*

JA 87-90 (emphasis added).

On December 6, 2000, Mr. Stein was sent another form letter by MAMSI. JA 95-96. Except for the date, this was the same form letter that MAMSI had sent previously, *see* JA 87-90, offering Mr. Stein the opportunity to represent MAMSI in state court. As before, this letter stated that "[y]our immediate attention is requested, *otherwise we will be compelled to retain counsel to pursue recovery of our lien...*" JA 88, 90, 96 (emphasis added).

On April 13, 2001, Mr. Stein and Ms. Sereboff both received a letter from MAMSI. JA 104-108. This letter purported to be a "formal demand" by MAMSI that Ms. Sereboff "endorse[] the enclosed lien." JA 105, 107.

On April 24, 2001, Mr. Stein responded to MAMSI's April 13, 2001 letter. JA 108-110. In this letter, he informed MAMSI that he did not believe that it was entitled to reimbursement, citing four Ninth Circuit Court opinions. PA 42a, ¶22. In his letter, Mr. Stein noted that he "would be happy to discuss this with you after you have had an opportunity [to] review the Points and Authorities which I have supplied." JA 109.

On May 7, 2001, Mr. Stein received another form letter from MAMSI. JA 110-112. Except for the date and the notation of "SECOND REQUEST", this was the same form letter that MAMSI had sent almost seven months previously, *see* JA 87-90, offering Mr. Stein the opportunity to represent MAMSI in state court. As before, this letter stated that "[y]our immediate attention is requested, *otherwise we will be compelled to retain counsel to pursue recovery of our lien...*" JA 111 (emphasis added).

On May 23, 2001, Mr. Stein received a letter from MAMSI responding to his April 24, 2001 letter. JA 116-117. On May 30, 2001, Mr. Stein responded to this letter. JA 117-118. In his response, Mr. Stein stated:

> If you believe that MAMSI is entitled to collect monies out of this litigation, I would suggest that you retain counsel in California to protect your interests since under California law I do not believe that I can represent MAMSI and my client at the same time. . . If you believe strongly that you are entitled to this reimbursement, then the lawyer who you retain would be able to protect

> your interests in litigating here in California and could negotiate separately with the defendants for reimbursement of all monies paid by you.

JA 118; PA 43a ¶27.

On June 7, 2001, Mr. Stein wrote again to MAMSI, that "[f]ollowing your verbal request of June 7, 2001, I am enclosing a copy of the Sereboff [state court] complaint." JA 119; PA 43a ¶28.

Approximately one and a half years later (in January of 2003),[2] the Sereboffs' state court action settled in full for $750,000. PA 44a ¶34; JA 139-143. On March 12, 2003, MAMSI contacted the Sereboffs to request payment of the $74,869.37 that it had paid on their behalf. PA 45a ¶¶35-36; JA 134-136. On March 20, 2003, Mr. Stein responded to MAMSI reiterating his opinion that MAMSI's asserted liens were not collectable. PA 45a ¶38, JA 136-138.

III. This Litigation.

On August 5, 2003, MAMSI filed suit in federal court seeking reimbursement under section 502(a)(3) of ERISA. JA 3-4, 33-40 (MAMSI's verified complaint). As Mr. Stein had *already* distributed the settlement proceeds to the Sereboffs by this point, MAMSI sought a temporary restraining order and preliminary injunction to

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[2] After the September 11 attacks, a number of the defendants in the state court lawsuit went into bankruptcy. As such, the litigation was stayed on three occasions to exclude them from further participation, but allowing the Sereboffs to go forward against the remaining defendants. PA 37a ¶7.

require the Sereboffs to retain at least $74,869.37 from the settlement proceeds. JA 4; 41-43 (Motion); 44-56 (Memorandum in Support); 57-61 (Proposed Order).

On August 26, 2003, the district court approved a stipulation between the parties, which provided that:

> Defendants Joel Sereboff and Marlene Sereboff shall preserve $74,869.37 of the settlement funds recovered because of injuries sustained on or about June 22, 2000, which are currently held in investment accounts, (and must keep the settlement funds in those investment accounts) until the Court rules on the merits of this case and all appeals, if any are exhausted;

JA 69; 5.

Shortly thereafter, MAMSI and the Sereboff entered into a joint stipulation of facts. PA 36a-45a (Joint Stipulation of Facts); JA 71- 143 (the 27 exhibits attached to the Joint Stipulation). MAMSI then filed a motion for summary judgment, JA 7, and the Sereboffs filed a motion to dismiss, JA 7-8. Both motions turned entirely on whether MAMSI was entitled to seek reimbursement under § 502(a)(3) of ERISA out of the funds being preserved in the Sereboffs' investment accounts.

In January of 2004, the district court issued an opinion denying the Sereboffs' motion to dismiss and

granting MAMSI's motion for summary judgment.[3] JA 10-11; PA 24a-33a. The district court also entered an order, which stated in pertinent part that:

> ON OR BEFORE FEBRUARY 9, 2004, DEFENDANTS JOEL SEREBOFF and MARLENE SEREBOFF SHALL PAY OVER TO PLAINTIFF OR ITS DESIGNEE THE PRINCIPAL SUM OF $74,869.37, TOGETHER WITH INTEREST AT THE LEGAL RATE OF SIX PERCENT PER ANNUM DATING FROM MARCH 12, 2003
>
> . . .
>
> IN ACCORDANCE WITH THE TERMS OF THE MAMSI LIFE AND HEALTH INSURANCE PPO, THE AMOUNT PAYABLE BY DEFENDANTS TO PLAINTIFF SHALL BE REDUCED BY PLAINTIFF'S *PRO RATA* SHARE OF "REASONABLE ATTORNEY FEES AND COURT COSTS". . . .

PA 34a-35a. In May of 2004, the district court issued a separate opinion and order granting MAMSI's request for attorneys' fees. PA 20a-22a

The Sereboffs appealed both orders. The Fourth Circuit affirmed the first order (i.e., the Reimbursement Award) but reversed the second order regarding

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[3] The granting of MAMSI's motion was only partial because the court, against MAMSI's urging, reduced the reimbursement amount by MAMSI's pro rata share of reasonable attorney fees and court costs. PA 32a.

attorney's fees. PA 1a-19a. The Sereboffs timely filed a petition for rehearing and suggestion for rehearing *en banc* which was denied on June 1, 2005. PA 46a-47a.

SUMMARY OF ARGUMENT

This Court has repeatedly held that the ERISA statute authorizing fiduciaries such as MAMSI to sue plan beneficiaries for "appropriate equitable relief" does not authorize "legal" actions for the recovery of money damages. *Great-West Life & Annuity Insurance v. Knudson*, 534 U.S. 204 (2002); *Mertens v. Hewitt*, 508 U.S. 248; *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

The relief that MAMSI requested in this case, however, is nothing more than compensatory damages for breach of contract—a classic action at law. Although MAMSI argued that it was seeking "equitable restitution," the courts below should have, but failed to, "decline th[e] invitation to perceive equitable clothing where the requested relief is nakedly contractual." *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 104 (CA2 2005).[4]

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[4] To be clear, however, Petitioners' do *not* contend that this lawsuit seeks legal relief *merely* because MAMSI's rights derive from a contract and the plan seeks money. Petitioners acknowledge that a breach of contract may occasionally entitle a plaintiff to seek "equitable relief" in the form of money. *See e.g.*, Malcolm D. Talbott, *Restitution Remedies in Contract Cases: Finding a Fiduciary or Confidential Relationship to Gain Remedies*, 20 Ohio St. L.J. 320, 326 (1959) ("[T]he equitable remedies of constructive trust and equitable lien are granted in simple breach of contract cases *in limited areas to give specific restitution of property or to secure an*

In its opposition to the petition for certiorari, MAMSI seems to suggest alternate theories, not considered by the courts below, as to why the relief it was granted is equitable in nature. Just as before, however, these alternate theories advanced by MAMSI fail to satisfy the historical test mandated by this Court in *Knudson*.

ARGUMENT

THE REIMBURSEMENT AWARD IS NOT "APPROPRIATE EQUITABLE RELIEF"

This lawsuit was brought by MAMSI in federal court under § 502(a)(3) of ERISA. Section 502(a)(3) authorizes the fiduciary of an ERISA plan to bring a civil action to enjoin any act which violates the terms of a plan or "to obtain other appropriate equitable relief" to enforce a plan's provisions. 29 U.S.C. § 1132(a)(3).

It is well-settled law that the phrase "equitable relief" in § 502(a)(3) limits those lawsuits that may be brought under the statute to those seeking a category of relief (*e.g.*, injunction, restitution) that would have been "typically available in equity." *See Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) (hereinafter, "*Mertens*"). In order to satisfy § 502(a)(3), however, it is not enough for a plaintiff to merely request a category of relief that would have been typically available in equity. This Court has made clear that—in evaluating whether a particular

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interest in specific property, however, this is done reluctantly by the courts.") (emphasis added) (hereinafter, "*Restitution in Contract*").

civil action is authorized by § 502(a)(3)—a federal court must look not only at the category of relief requested but also to the historical context in which such relief would have been available in a pre-merger court of equity. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (hereinafter, "*Knudson*"). In other words, a plaintiff may not evade the limits of § 502(a)(3) merely by seeking a remedy that can be considered an equitable remedy. Rather, the plaintiff may bring a suit pursuant to § 502(a)(3) only if it seeks an equitable remedy *and* the remedy is one that would historically have been granted under identical or analogous circumstances by a pre-merger court of equity.

Attempting to satisfy the strict requirements of § 502(a)(3), MAMSI requested various categories of relief (*i.e.*, restitution by way of a constructive trust) that were "typically available in equity". This is nothing more than artful pleading. MAMSI's position—like the decisions below—ignores this Court's mandate in *Knudson* that an equitable remedy is subject to "the limitations upon its availability that equity typically imposes." *Knudson*, 534 U.S. at 211 n.1. Put simply, pre-merger courts of equity would never have classified MAMSI's attempt to obtain money to fulfill a contractual reimbursement obligation as one that qualified for equitable relief.[5]

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[5] As the court below observed, "[i]n disputes where 502(a)(3) does not expressly authorize relief, the federal courts are not empowered to award it." PA 8a. *Cf. Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) ("The six carefully integrated civil enforcement provisions found in section 502(a) of the

A. Section 502(a)(3) of ERISA Only Authorizes a Court to Award "Equitable Relief".

For well over a decade, it has been settled that § 502(a)(3) of ERISA only authorizes civil actions seeking "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens*, 508 U.S. at 256 (emphasis in original).

In *Mertens*, this Court addressed whether § 502(a)(3) authorized a lawsuit for money damages by ERISA plan beneficiaries against a third party who participated knowingly in the plan fiduciaries' breach of their fiduciary duties. Although "[m]oney damages are, of course, the classic form of *legal* relief," *id.* at 255, the *Mertens* petitioners—supported by the United States as *amicus curiae*—argued that they sought "equitable relief" under § 502(a)(3) because, "at common law, the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust." *Id.* (citations omitted). In other words:

> "[A]lthough a beneficiary's action to recover losses resulting from a breach of duty superficially resembles an action at law for

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statute as finally enacted provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) ("The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.").

> damages," the Solicitor General suggest[ed that], "such relief traditionally has been obtained in courts of equity" and therefore "is, by definition, 'equitable relief.'"

Id. (quoting Brief for United States as *Amicus Curiae* 13-14).

Over a dissent on this precise point, this Court explicitly rejected the Solicitor General's argument:

> In the context of the present statute, we think there can be no doubt. Since *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under 502(a)(3) to "equitable relief" in the sense of "whatever relief a common-law court of equity could provide in such a case" would limit the relief *not at all*. We will not read the statute to render the modifier superfluous.

Id. at 257. In other words, the *Mertens* Court made clear that the relevant inquiry for purposes of § 502(a)(3) is not simply whether the plaintiff is seeking a remedy that can be classified as equitable, and it rejected the position that a plaintiff can evade the limits of § 502(a)(3) merely by pointing to *some* remedy that a pre-merger court of equity *might* have awarded in *some* broad category of cases to which plaintiff's case belongs.

The *Mertens* Court noted, in dicta, that certain remedies such as an injunction and restitution were "typically available in equity." *Mertens*, 508 U.S. at 256.

This Court clarified in *Knudson*, however, that such remedies were not *always* "typically available in equity" and, thus, remediable under § 502(a)(3). *Knudson*, 534 U.S. at 211 n.1. In particular, the Court held that that a remedy would only qualify as "equitable relief" under § 502(a)(3) if the conditions that a pre-merger equity court attached to its provision were present in the case at bar. A brief examination of the facts of *Knudson* is instructive:

Janette Knudson was rendered quadriplegic by a car accident. *Id.* at 207. At the time of the accident, she was covered by a health and welfare plan run by her husband's employer. *Id.* As required by the relevant plan documents, substantial medical expenses were paid on Ms. Knudson's behalf by the plan and its insurer (collectively, the "Great West Petitioners"). *Id.* The Knudsons then sued several alleged third-party tortfeasors in California state court and ultimately settled the lawsuit for an amount in exeess of the medical benefits paid by the Great West Petitioners. *Id.* at 207-08. Although the plan documents included a provision that imposed certain reimbursement obligations on Ms. Knudson, a dispute emerged regarding the precise amount of the reimbursement obligation. *Id.* at 208.

Ultimately, the Great West Petitioners sued the Knudsons in federal court seeking to enforce the contractual reimbursement provision contained in the plan. *Id.* The sole object of that federal lawsuit was to obtain money to which the Great West Petitioners

claimed entitlement under the plan (*i.e.*, a contract).[6] Nonetheless, the Great West Petitioners maintained that their lawsuit was authorized by § 502(a)(3) because they sought to enforce their monetary reimbursement claim by requesting two categories of relief (injunction and restitution) that were explicitly identified in *Mertens* as "typically available in equity." *Id.* at 210-218.

First, the Great West Petitioners argued that they were "entitled to relief under § 502(a)(3)(A) because they [sought] 'to enjoin a[n] act or practice'—respondents' failure to reimburse the Plan—'which violates ... the terms of the plan.'" *Knudson*, 534 U.S. at 210. Despite the fact that an "injunction" had specifically been identified in *Mertens* as a category of relief that was "typically available in equity," *Mertens*, 508 U.S. at 256, the *Knudson* Court rejected the argument that the *particular* injunction sought by the Great West Petitioners satisfied the *Mertens* test. As the Court noted, "an injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation, was not typically available in equity." *Knudson*, 534 U.S. at 210-11 (citing 3 Restatement (Second) of Contracts § 359 (1979); 3 D. Dobbs, Law of Remedies § 12.8(2), at 199 (2d ed. 1993) (hereinafter, "Dobbs"); 5A A. Corbin, Contracts § 1142, p. 119 (1964) (hereinafter, "Corbin")) (footnote omitted).

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[6] "[B]y the act of accepting benefits, a beneficiary generally becomes contractually bound to the clear terms on which they were offered." Restatement (Second) Contracts §§ 56, 59 (1981).

Second, the Great West Petitioners argued that § 502(a)(3)(B) authorized them to seek restitution to remedy the alleged unjust enrichment that Ms. Knudson received by refusing to honor her contractual reimbursement obligation. Despite the fact that "restitution" had specifically been identified in *Mertens* as a category of relief that was "typically available in equity," *Mertens*, 508 U.S. at 256, the *Knudson* Court concluded that the *particular* restitution sought by Great West was not "equitable." *Id.* at 214. The Court observed that:

> not all relief falling under the rubric of restitution is available in equity. In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity. Thus, "restitution is a legal remedy when ordered in a case at law and an equitable remedy ... when ordered in an equity case," and whether it is legal or equitable depends on "the basis for [the plaintiff's] claim" and the nature of the underlying remedies sought.

Id. at 213 (citations omitted).

In sum, *Knudson* makes clear that, in assessing whether a claim is remediable under § 502(a)(3), a federal court must look not only at the category of relief sought but also at the historical context in which such a remedy would have been available in a pre-merger court of equity. *Knudson*, 534 U.S. at 216 (an "approach[] which looks only to the nature of the relief and not to ***the conditions that equity attached to its provision***, logically

leads to [a] conclusion [that] renders the statute's limitation of relief to '[injunction] ... or other appropriate equitable relief' utterly pointless.") (emphasis added).[7]

B. The Fourth Circuit Erred In Characterizing the District Court's Award as Equitable Restitution.

The district court and Fourth Circuit in this case both characterized MAMSI's suit as one for "equitable restitution." This conclusion is inappropriate in light of the historical understanding of this remedy. Equitable restitution—placed within a proper historical context—simply is not available to MAMSI here.

The district court in this case held that MAMSI could obtain monetary reimbursement from the Sereboffs under § 502(a)(3) because MAMSI was seeking equitable restitution as defined by this Court in *Knudson*. The court's opinion reasoned as follows:

> *Knudson* provided some critical *obiter dicta* in delineating the circumstances under which an ERISA fiduciary's claim falls on the "equity" or "law" side of the often fuzzy line separating the two forms of monetary relief encompassed by the term restitution: . . .

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[7] *See also id.* at 211 n.1 ("[I]njunction is inherently an equitable remedy, . . . and statutory reference [in 502(a)(3)] to that remedy must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes. Without this rule of construction, a statutory limitation to injunctive relief would be meaningless, since any claim for legal relief can, with lawyerly inventiveness, be phrased in terms of an injunction." (citations omitted).

> [The court proceeded to quote at length from *Knudson*, 534 U.S. at 213-15]. . . .
>
> Manifestly, in the case at bar, plaintiff (an ERISA fiduciary) seeks to recover funds that (1) are "specifically identifiable" (because they were paid to the Sereboffs and their attorney on behalf of the tortfeasors causing their injuries, and the specific portion claimed by plaintiff has been separated from the balance of those funds); (2) "belong in good conscience to the Plan" (because the plain language of the plan indisputably requires reimbursement under the circumstances of the Sereboffs' tort claims arising out of the California accident); and (3) "are within the possession and control of the defendant beneficiary" because the Sereboffs and their attorney received the funds in hand and the Sereboffs have segregated the claimed monies in an investment account to abide the result of this lawsuit."

PA 28a-31a. As such, the court granted MAMSI's motion for summary judgment for monetary reimbursement. The court denied MAMSI's motion to the extent that it attempt to avoid a deduction for the Sereboffs' attorneys fees and litigation expenses. PA 34a-35a.

On appeal, the Fourth Circuit repeated the district court's cursory analysis, *see* PA 11a-12a, and held that

"the action pursued by MAMSI, and resulting in the Reimbursement Award, is equitable in nature under 502(a)(3), and the court properly granted relief with respect to it." *Id.* at 12a.

Neither the district court nor the Fourth Circuit turned to standard treatises or any other historical sources in evaluating whether MAMSI did, in fact, seek relief that was "typically available in equity." Instead, the courts merely identified distinctions from, or circumstances that did not exist in, *Knudson*, and from that, concluded that the relief sought must be authorized by § 502(a)(3). By failing to consider whether the relief MAMSI sought would typically have been available in a pre-merger court of equity, the courts below ignored *Knudson's* mandate. Proper application of the historical inquiry required by *Knudson* reveals that MAMSI's lawsuit does not seek relief that was typically remediable in equity.

As explained by Professor Dobbs, in order to obtain a constructive trust or equitable lien, the ability to trace the plaintiff's funds is critical:

> [t]he plaintiff must trace his money or property to some particular funds or assets. Especially when the defendant has taken money, tracing is difficult. In such cases the plaintiff can often prove that the money was taken, but has difficulty in identifying that money with funds in the defendant's accounts. . . . ***If the tracing is incomplete, the rule that requires a res is invoked and the constructive trust is denied,***

> ***with the result that the defendant is only a simple debtor.***

1 Dobbs § 4.3(2), at 593 (emphasis added); *see also* 2 Dobbs § 6.1(2), at 7-8 ("In all cases, however, the trust or lien is invoked only when there is a specific res—***either the funds taken from the plaintiff or property the wrongdoer has exchanged for those funds***.) (emphasis added); *see also* Restatement (Second) of Trusts § 202 (vol. 1 at 444) (1959) ("Following Trust Property Into Its Product") (where trustee acquires property by wrongful disposition of trust assets, the acquired property may be subjected to a constructive trust or equitable lien only if it is "the product of the trust property" and "can be traced").

In this case, MAMSI's claim is *not* for return of particular money that the Plan paid to the Sereboffs and that the Sereboffs still retain. There is absolutely no evidence in the record that any Plan money was ever paid to the Sereboffs, as opposed to providers of their medical services. *See e.g.*, JA 35, 45, 58 (noting that "the Plan paid medical benefits ***on behalf of*** the Sereboffs). Moreover, any money that the Plan paid on behalf of the Sereboffs has already been spent on legitimate medical expenses. What MAMSI is seeking, therefore, is not the return of Plan money or profits from its use or exchange.

Rather, MAMSI is seeking to recover new money paid out by third parties, the alleged tortfeasors.[8]

The district court's assertion that the funds in question "'belong in good conscience to the Plan' (because the plain language of the plan indisputably requires reimbursement under the circumstances of the Sereboffs' tort claims arising out of the California accident)" is perhaps true as a matter of fairness. Mere fairness, however, is the wrong criteria by which to judge if a remedy was "typically available in equity." In the words of one scholar,

> "the entire subject of restitution" is 'equitable' in the sense that fairness considerations drive whether the plaintiff is entitled to restitution. At the same time, it is important to recognize that restitution has roots in both the courts of law and the courts of equity, ***with well-established rules indicating which claims are legal and which are equitable.***

Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. Rev. 1577, 1606 (2002) (footnote omitted) (emphasis added) (hereinafter, "*Monetary Restitution*").

Whether or not funds "belong in good conscience" to another, the ability to seek restitution of those funds—absent the tracing described above—was not "typically

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[8] Notably, this is money that MAMSI could have sought directly had it intervened as a subrogee in the Sereboffs state court action.

available at equity." *See Gaines v. Miller*, 111 U.S. 395, 397 (1884) (equitable relief denied, explaining: "Whenever one person has in his hands money equitably belonging to another, that other person may recover it by *assumpsit* for money had and received [citations omitted]. The remedy at law is adequate and complete.");[9] 1 Dobbs § 4.1(1), at 556 (Restitution claims for money are usually claims "at law."); Murphy, *Monetary Restitution*, 55 SMU L. Rev. at 1603 ("With respect to the particular context of a restitutionary claim for money, the plaintiff historically has had to assert the claim at law.") (footnote omitted).[10]

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[9] "The count [of money had and received] includes money paid by a third person, so long ***as the money in good conscience belongs to the plaintiff***." 1 Dobbs § 4.2(3), at 582 (citing *Klass v. Twin City Fed. Sav. & Loan Ass'n*, 291 Minn. 68, 70, 190 N.W.2d 493, 494 (1971)) (emphasis added)

> In *Klass*, a tenant, in addition to fixed rental, agreed to pay the lessor all the taxes on the property. The property was eventually condemned by a housing authority. In the condemnation award, an allowance was made to the owner-lessor to reimburse him for taxes he had paid on the property and for which th authority had the benefit. The tenant sued to recover the sum allowed as taxes, on the ground that in equity and good conscience that share of the recovery belonged to him. The recovery was allowed, with the statement that 'cases dealing with unjust enrichment on money had and received support recovery in this situation.'"

Id.

[10] Although not applicable to this case, there are a limited set of other circumstances where monetary restitution was available at equity, *e.g.*, in certain cases against insolvent defendants (*see* Restatement of Restitution § 160 cmt. e (1937) ("Where . . . the payee is insolvent, the payor can maintain a suit in equity for the

The fact that the funds are "specifically identifiable" and "within the possession and control of the defendant beneficiary" does not change this analysis. "Even if the plaintiff can identify as his a particular fund of money held by the defendant, the plaintiff generally cannot recover the money in a suit in equity because the legal remedy is deemed adequate." Murphy, *Monetary Restitution*, 55 SMU L. Rev. at 1604 (footnote omitted). Put simply, MAMSI has not asserted a claim to specific property within the limited class of traditional equitable remedies for restitution. And despite MAMSI's attempt to dress the relief it seeks in "equitable" language, the object of this lawsuit is "in essence, to impose personal liability on [the Sereboffs] for a contractual obligation to pay money—relief that was not typically available in equity." *Knudson*, 534 U.S. at 210.[11]

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specific recovery of the money paid by mistake, if the payee still holds it, since the money is held upon a constructive trust for him.")); against a fiduciary who has violated his duty (*see* Restatement of Restitution § 197 (1937) ("Where a fiduciary in violation of his duty to the beneficiary receives or retains a bonus or commission or other profit, he holds what he receives upon a constructive trust for the beneficiary.")).

[11] *Cf* John P. Dawson, *Restitution or Damages?*, 20 Ohio St. L.J. 175, 191 (1959) ("Under existing doctrines it is only through extension of quasi-contract restitution that reimbursement can be given for "requested" action, but as the gain to the promisor is reduced toward zero so that the claim is stripped down to the promisee's loss, it becomes harder to view it as anything more than a damage action for breach of a promise assumed to be unenforceable by damage action or otherwise.")

C. The District Court's Award Is Not Another Form of "Equitable Relief."

In its brief in opposition to the petition for a writ of certiorari (hereinafter, "Opposition" or "BIO"), MAMSI hints at two theories of why its claims are "equitable" that were not considered by the courts below. Neither theory is sufficient to justify the district court's award under § 502(a)(3).

1. Equitable lien by contractual agreement.

In its Opposition, MAMSI observes that:

> [a]s the United States has noted, "[t]his Court has long recognized that a *contractual* obligation to pay an attorney out of specific funds creates a lien on those funds that may be enforced through a suit in equity. *Barnes v. Alexander*, 232 U.S. 117, 121-123 (1914); *Wylie v. Coxe*, 56 U.S. 415, 420 (1854). The same rationale applies here.

BIO at 13. It is true that an equitable lien can be imposed as a matter of contract, as opposed to the form discussed above.[12] As a matter of contract, an equitable lien may be:

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[12] "The term 'equitable lien' is used in at least two fairly disparate senses. . . The equitable lien when imposed, ***not as a matter of contract***, but to prevent unjust enrichment, is essentially a special, and limited, form of the constructive trust. The lien is imposed for reasons that, in principle, are the same as those that warrant the constructive trust, and it works in substantially the same

> created by express or at least implied-in-fact agreement of the parties, as where a borrower agrees that a certain fund or piece of property will stand as security for his debt. Such liens are 'equitable' in the sense that they may have failed to comply with some requirement for establishment of a 'common law' lien, but are recognized and enforced in the courts of equity.

1 Dobbs § 4.3(3) at 601 (footnote omitted).

Just as with the forms of equitable restitution discussed above, however, an equitable lien by express agreement has specific conditions that equity attached to its provision. And, just as with the remedies discussed above, those conditions are not satisfied here:

> [C]reation of an equitable lien by agreement requires that "the property or fund sought to be charged be distinctly appropriated to, or as security for, the payment of the debt or other liability in question." 51 Am. Jur. 2d Liens §29 (1970). "The promisor must place the fund beyond his control and grant to the promisee a complete and present right therein..." *Id.* An equitable lien requires "more than a mere expectation, or even an agreement, that a debt

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way. Where the constructive trust gives a complete title to the plaintiff, the equitable lien only gives him a security interest in the property, which he can then use to satisfy a money claim." 1 Dobbs § 4.3(3), at 601 (footnote omitted) (emphasis added).

> will be paid out of a particular fund," *id.*, and "more than a mere promise by a debtor to pay a debt out of a particular fund due him, as soon as he receives it." *Id.*

Note, *Adding Insult to Injury, ERISA, Knudson, and the Error of the Possession Theory*, 89 Minn. L. Rev. 1214, 1235 (2005). (hereinafter, "*Adding Insult to Injury*");

> In a reimbursement action, at the time the policyholder agrees to the plan terms or accepts medical benefits from the plan, she possesses no third-party recovery which she can appropriate to the plan; the most she can offer to the plan is her promise to repay if and when she later obtains recovery. Such a promise might support a contract claim, but cannot support an equitable lien by express agreement.[13]

Id; see also Taylor v. Wharton, 43 App. D.C. 104, 1915 WL 20927 (App. D.C. Feb 01, 1915) (distinguishing *Barnes v. Alexander*—the case cited by MAMSI—on this basis).

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[13] "Such a lien is a right over the thing with which the contract deals, by means of which the obligee is "enabled to follow the identical thing" to which the lien attaches and enforce the obligation by a remedy which operates directly upon that thing. Therefore, in order that it may arise, the agreement must deal with some specific property, such as a tract of land or particular chattel or securities, and identify it or so describe it that it can be identified." *Bassett v. City Bank & Trust Co.*, 165 A. 557, 561 (1933) (citing 3 Pomeroy's Equity Jurisprudence (4th Ed.) §§ 1234, 1235, pp. 2961, 2964).

MAMSI may argue that the Reimbursement Award is authorized by § 502(a)(3) because MAMSI has asserted an implied-in-fact equitable lien. An implied-in-fact equitable lien, however, was not typically available in equity. To the contrary, a court of equity would only intervene to imply a lien when an intended contractual lien could not be enforced at law because of some technical defect. 1 Dobbs § 4.3(3), at 601.

There is no suggestion in this case, however, that MAMSI's reimbursement provision is somehow legally deficient. As such, any claim to an implied-in-fact equitable lien would rest entirely on the grounds that MAMSI had no adequate remedy at law by which to enforce its contractual rights.[14] Permitting relief under § 502(a)(3) on that basis presents the precise problem identified by this Court in *Knudson*—"it renders the statute's limitation of relief to '[injunction] ... or other appropriate equitable relief' utterly pointless." *Knudson*, 534 U.S. at 216. Put differently, if the mere unavailability of damages elsewhere could bring the same relief within § 502(a)(3), the Congressional rejection of a damages remedy under the statute, as established by this Court, would be reversed.

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[14] The premise of this argument has not remotely been established. *See e.g. Comment, Legal Reimbursement Claims by ERISA Plan Fiduciaries*, 72 U. Chi L. Rev. 103 (2005) (arguing that ERISA does not preempt a state law breach of contract claim by an ERISA plan fiduciary against a beneficiary because such a claim for reimbursement is not a claim for benefits).

2. Subrogation.

In its Opposition, MAMSI also notes that:

> As the Court has consistently affirmed for over a century, "'The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties.'" *Pearlman* v. *Reliance Ins. Co.*, 371 U.S. 132, 137 n.12 (1962) (quoting *Memphis & L.R.R. Co.* v. *Dow*, 120 U.S. 287, 301-302 (1887)).

BIO at 14.[15]

To be clear: what MAMSI has asserted in this case is *not* a subrogation claim. Black's Law Dictionary defines "subrogation" as "[t]he principle under which an insurer

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[15] It bears mention that:

> at common law, subrogation was not permitted on personal injury claims. A personal injury claim could not be "assigned" at common law and, therefore, efforts to have subrogation on personal injury claims ran afoul of this principle. The effort to seek subrogation on personal injury claims also violated the common-law prohibition against splitting a cause of action. The existing practice of permitting subrogation on property damage claims had been tolerated as an exception to this prohibition, but historically, courts were unwilling to permit an exception in the area of personal injury claims.

Roger M. Baron, *Public Policy Considerations Warranting Denial Of Reimbursement To ERISA Plans: It's Time To Recognize The Elephant In The Courtroom*, 55 Mercer L. Rev. 595, 613 (2004) (footnotes omitted) (hereinafter, "Reimbursement to ERISA Plans").

that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured *against a third party* with respect to any loss covered by the policy." Black's Law Dictionary, 7th Ed., at p. 1440 (emphasis added).

Similarly, Dobbs provides that "[s]ubrogation simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against the defendant." 1 Dobbs, § 4.3, at 404. It is clear, therefore, that while the principle of subrogation would have allowed MAMSI to "stand in the shoes" of the Sereboffs and pursue a claim against the third party tortfeasors for the loss that MAMSI covered, the same principle does not allow MAMSI to pursue a claim against its own insured. *Qualchoice v. Rowland*, 367 F.3d 638, 649-50 (CA6 2004) ("subrogation is not available in a situation such as this, when the plan participant or beneficiary has already recovered, because subrogation allows a plan fiduciary only to step into the shoes of a plan participant or beneficiary and assert the rights of the participant or beneficiary against another; subrogation does not allow a plan fiduciary to obtain a judgment of personal liability against a plan beneficiary or participant").

MAMSI was invited to join in the Sereboffs' lawsuit against the third party tortfeasors and, had it intervened in that lawsuit, could have asserted its rights, under a principle of subrogation, against these tortfeasors for the loss covered by MAMSI. What MAMSI now asserts—although often referred to as a "subrogation" right to

reimbursement—is a right that is based entirely on its contract with the Sereboffs. Such a right was not "typically available in equity."

D. Even If It Constitutes "Equitable Relief," the Reimbursement Award Is Not "Appropriate".

As this Court has confirmed, § 502(a)(3) requires that any relief awarded be not only "equitable" but "appropriate" as well:

> In *Varity Corp*, we explained that § 502(a)(3) is a "'catchall' provisio[n]" that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy.". . . . In *Varity Corp* [] it was undisputed that respondents were seeking *equitable* relief, and the question was whether such relief was "appropriate" in light of the apparent lack of alternative remedies.

Knudson, 534 U.S. at 221 n.5 (citing *Varity Corp. v. Howe*, 516 U.S. 489, 507-15 (1996).[16]

The argument was advanced in *Knudson* that the contractual reimbursement claim at issue did not seek "*appropriate* equitable relief" because any

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[16] The Court went on to make clear that "*Varity Corp.* did not hold [] that § 502(a)(3) is a catchall provision that authorizes *all* relief that is consistent with ERISA's purposes and is not explicitly provided elsewhere" because to accept such a position "is to ignore the plain language of the statute, which provides fiduciaries with only equitable relief." *Id.*

reimbursement lawsuit brought by a plan under § 502(a)(3) necessarily results in harmful duplicative state and federal court litigation that is unnecessary to protect plan interests. *See* Brief of *Amicus Curiae* in Support of the Judgment Below by Invitation of the Court, 2001 WL 740878, at 39-50. Because the Court concluded that the relief sought was not "equitable," it did not pass on the merits of this argument or the validity of its underlying premises:

> We express no opinion as to whether petitioners could have intervened in the state-court tort action brought by respondents or whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would have been pre-empted by ERISA. . . .
>
> We need not decide these issues because, as we explained in *Mertens*, "[e]ven assuming ... that petitioners are correct about the pre-emption of previously available state-court actions" or the lack of other means to obtain relief, "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration. . . . Because petitioners are seeking legal relief—the imposition of personal liability on respondents for a contractual obligation to pay money—502(a)(3) does not authorize this action.""

Knudson, 534 at 220-21.

While the Sereboffs certainly agree with the broad position advanced by appointed counsel in *Knudson*, there is no need to discuss it in any detail here.[17] For the reasons explained below, even if *some* awards of reimbursement are "appropriate" under 502(a)(3), the Reimbursement Award in this case certainly was not.

If this Court concludes that the lawsuit filed in this case seeks "equitable relief," then it has necessarily adopted some version of MAMSI's argument that:

> [T]he basis of the plans' claims is clearly equitable. The mere fact that the plan fiduciaries "may also have a right to recover from [the plan participants] for breach of contract does not alter the equitable nature of the suit. . ." [ ] "'The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice. . ." [and] driven by the fundamentally equitable desire

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[17] It is worth noting, however, that "ERISA does not require or even endorse the idea of reimbursement. The device of 'reimbursement' only recently evolved as an alternative method for an insurer to secure money in situations when an insurer might have a subrogation interest but otherwise would be precluded from recovery. In that regard, the prospect of subrogation in the area of medical expense claims (and the corresponding tool of 'reimbursement') is of relatively recent origin, having only been developed in the last thirty to forty years." Baron, *Reimbursement To ERISA Plans*, 55 Mercer L. Rev. 595 (footnotes omitted)

> ***to prevent unjust enrichment, rather than to make the insurer whole through breach-of-contract damages. . . .***"

BIO at 14 (citations omitted) (emphasis added). This view of "equitable relief," however, cannot be reconciled with the actual Reimbursement Award requested by and granted to MAMSI, through which MAMSI sought to be made whole, irrespective of whether such an award truly represented the prevention of the Sereboffs' unjust enrichment.

The position taken by MAMSI in the district court was that no determination need be made of whether, and to what extent, the Sereboffs' tort recovery actually constituted payment for past medical expenses and which, therefore, would constitute an unjust enrichment:

> [T]he Plan terms not only do not incorporate the make whole rule, but rather, specifically disclaim it by stating that "[t]he Company's share of the recovery will not be reduced because you or your dependent has not received the full damages claimed, unless the Company agrees in writing to a reduction." The make whole rule, therefore, does not apply here.

JA 53 (citing *In re Paris*, No. 99-1558, 2000 U.S. App. LEXIS 6883 (4th Cir. Apr. 17, 2000) for the proposition that "common law make whole rule does not apply when it overrides plan terms")).

The district court agreed; *see, e.g.*, JA 67 ¶4 ("the Plan provides for 100% reimbursement from Plan participants and their beneficiaries as set forth above [referring to the make-whole disclaimer]"). As a result, no determination has ever been made that any of the $750,000 recovered by the Sereboffs was compensation for past medical expenses that were paid by MAMSI and which, therefore, represent an unjust enrichment which has accrued to the Sereboffs.

The logic employed in granting the Reimbursement Award would permit plan fiduciaries to include provisions that authorize the reimbursement of all medical expenses paid on a beneficiary's behalf out of legitimate personal injury settlements, *regardless* of what these settlement payments were actually intended to compensate. This will have devastating consequences to those victims of catastrophic injury: "In the vast majority of such cases, due to liability insurance policy limits or lack of resources, these victims will never recover from the tortfeasor a settlement which fully compensates them for their damages." Baron, *Reimbursement To ERISA Plans*, 55 Mercer L. Rev. at 631.

It strains credulity to suggest that such relief is "appropriate." This Court should not endorse a rule that would encourage a *fiduciary* to explicitly disclaim doctrines that have served to protect beneficiaries so that, at the end of the day, the *fiduciary* is made whole at the expense of its beneficiary who is left "in part." *See id.* (arguing that "Congress has indicated that the goal of full and just compensation for employees and their beneficiaries should carry a higher priority than the goal of

strictly upholding plan documents as unilaterally drafted and amended by ERISA plans.").

CONCLUSION

For the above reasons, Petitioners respectfully request that this Court reverse the judgment of the court of appeals.

DATE: January 19, 2006

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IN THE

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JOEL SEREBOFF and MARLENE SEREBOFF,
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v.

MID ATLANTIC MEDICAL SERVICES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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RESPONDENT'S BRIEF

STATEMENT OF THE CASE

The district court properly decided Mid Atlantic's equitable claims for constructive trust or equitable lien under ERISA §502(a)(3), 29 U.S.C. §1132(a)(3), because they seek to enforce the plan's subrogation rights through a remedy that has been traditionally available in equity. The Court in *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002), observed that a plan fiduciary could state a valid claim for equitable restitution under §502(a)(3) if the disputed funds are specifically identifiable, belong in good conscience to the plan, and are within the possession of the defendant. See *Great-West*, 534 U.S., at 213. Courts have regularly enforced subrogation rights under a variety of equitable theories, including constructive trust and equitable lien.

The Court's determination in *Great-West* that the plan's suit sought personal liability and not equitable restitution—because there was no identifiable *res* in Knudson's hands—resulted from a traditional limitation on the exercise of equity jurisdiction, not an intention to declare the universal unenforceability of reimbursement provisions in ERISA plans, as petitioners appear to assert. Most courts that have subsequently addressed the issue, including the Fourth Circuit in this case, have correctly recognized that a plan fiduciary's reimbursement action comfortably fits within the narrow confines of traditional equity jurisprudence recognized in *Great-West* when the plan document embodies the plan's right to subrogation and the disputed funds are both specifically identifiable and within the defendant's possession. See, *e.g.*, *Mid Atl. Med. Servs., LLC* v. *Sereboff*, 407 F.3d 212, 218-219 (CA4), *cert. granted*, 126 S.Ct. 735 (2005); *Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan* v. *Willard*, 393 F.3d 1119, 1122 (CA10 2004); *Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan* v. *Varco*, 338 F.3d 680, 687-688 (CA7 2003), *cert. denied*, 542 U.S. 945 (2004); *Bombardier Aerospace Employee Welfare Benefits Plan* v. *Ferrer*, 354 F.3d 348, 355 (CA5 2003), *cert. denied*, 541 U.S. 1072 (2004); *Scholastic Corp.* v. *Kassem*, 389 F.Supp.2d 402, 411-413 (D Conn. 2005).

Petitioners' position, grounded in large measure on the erroneous position adopted by the Sixth and Ninth Circuits, rests on a fundamentally unsound premise—that actions "to enforce the terms of the plan," where those terms provide a right to subrogation and reimbursement, are merely actions to enforce contractual obligations for the payment of a sum of money, and are therefore inherently legal actions seeking legal relief, rather than equitable actions seeking equitable relief. See, *e.g.*, *Qualchoice, Inc.* v. *Rowland*, 367 F.3d 638, 649-650 (CA6 2004), *cert. denied*, 125 S.Ct. 1639 (2005); *Carpenters Health & Welfare Trust for S. Cal.* v. *Vonderharr*, 384 F.3d 667, 672-673 (CA9 2004), *cert. denied*, 126 S.Ct.

729 (2005). That proposition is contrary to *Great-West*, cannot be reconciled with the explicit language or purposes of the statute, and is contrary to more than two hundred years of jurisprudence.

For these reasons, the Court should affirm the decision of the court of appeals.

STATEMENT OF FACTS

The Sereboffs were beneficiaries under a self-funded health plan sponsored and maintained by the Katzen Eye Group, Marlene Sereboff's employer. Mid Atlantic serves as claims fiduciary of the plan. The plan contains an "ACTS OF THIRD PARTIES" subrogation and reimbursement provision that subrogates the plan to a participant's right to recover damages from a third party and gives the plan the "right to recover any payments" made to beneficiaries by third parties for injuries caused by the acts of "another person or organization." Joint App. 35. The plan agreement provides: "If you or your dependents receive[] benefits and have a right to recover damages from a third party, the Company is subrogated to this right." *Id.*, at 35-36. Further, "[a]ll recoveries from a third party (whether by lawsuit, settlement, or otherwise) must be used to reimburse the Company . . . to reflect that portion of the total recovery which is due the Company for benefits paid." *Id.*, at 36.

The provision explains that "[a]ny remainder" will be the participant's and that the plan's share of the recovery will not be reduced because the participant "has not received the full damages claimed, unless the Company agrees in writing to a reduction." *Ibid.* The subrogation provision also obligates beneficiaries to "promptly advise the Company whenever a claim is made against a third party" and requires them to execute any assignments or liens and "provide information" that Mid Atlantic requests. *Ibid.*

On June 22, 2000, the Sereboffs were visiting California and were in the process of returning a vehicle to a rental-car facility at San Jose International Airport when another vehicle struck them. The plan paid the Sereboffs' medical expenses, which totaled $74,869.37. The Sereboffs initiated a state-court action in California in August 2000 against the joint tortfeasors for personal injury. *Id.*, at 81. The Sereboffs complained that they had suffered "wage loss, *hospital and medical expenses*, general damages, loss of earning capacity, [and] other damage" in the form of prejudgment interest. *Id.*, at 82 (emphasis added). In late 2000 and early 2001, the plan reminded the Sereboffs and their lawyer that the plan was entitled to reimbursement should the California litigation be successful, asserted a subrogation lien against each of the Sereboffs for the amount of benefits paid, and asked the Sereboffs to execute subrogation-lien agreements acknowledging their obligations under the plan. *Id.*, at 87-106. The Sereboffs did not endorse the lien acknowledgments. Instead, responding to Mid Atlantic's "formal demand" in April 2001 for endorsement of the liens, the Sereboffs' lawyer indicated that "insurance carriers are not permitted to recover subrogation liens" under Ninth Circuit case law. *Id.*, at 104-110. Nevertheless, the plan paid additional benefits throughout 2001 and 2002, and it repeatedly reasserted its subrogation liens and sent updates to the Sereboffs and their lawyer about the current value of the liens. *Id.*, at 121-128.

In its letters, the plan also continually asked the Sereboffs and their lawyer to "advise [Mid Atlantic] when there is a change in the status of the case which could affect our subrogation lien[s]"; and those same letters requested that the Sereboffs send checks for the lien balances to Mid Atlantic if the case settled. *Id.*, at 121, 123; see also *id.*, at 124, 125, 127, 128. Without notifying Mid Atlantic or seeking its consent, the Sereboffs settled the California litigation in January 2003, and the defendants paid the Sereboffs $750,000.

Mid Atlantic did not know that the case had settled and continued sending the Sereboffs and their lawyer letters updating the lien amounts and asking to be advised of the case's status in order to protect its liens. *Id.*, at 129-136. The Sereboffs never discharged the amount of the plan's asserted liens. Instead, their lawyer disbursed the funds to the Sereboffs and to his law firm, and the Sereboffs placed the funds into their investment accounts. Without telling Mid Atlantic that the case had settled, the Sereboffs' lawyer responded to Mid Atlantic's March 2003 letters by asserting that the liens were not collectable, citing *Great-West* and *Westaff (USA) Inc.* v. *Arce*, 298 F.3d 1164 (CA9 2002). Joint App. 136-138.

After learning that the case had settled, Mid Atlantic instituted this action in August 2003 in the District of Maryland, where the Sereboffs live, under §502(a)(3) of ERISA, which authorizes ERISA participants or fiduciaries to enjoin any act violating the terms of an ERISA plan or to "obtain other appropriate equitable relief" to enforce a plan's provisions. §502(a)(3). Mid Atlantic asserted the plan's subrogation rights and requested, among other forms of relief, restitution of, and a constructive trust or equitable lien over, the disputed funds held by the Sereboffs in their investment accounts. Mid Atlantic also sought emergency relief to prevent dissipation of the disputed funds, and the Sereboffs agreed to "preserve $74,869.37 of the settlement funds" until the district court ruled on the merits of the dispute and any appeals were exhausted. *Id.*, at 39, 41-42, 69.

Mid Atlantic moved for summary judgment, asserting that the claim to "recover the disputed proceeds" sought "appropriate equitable relief" under §502(a)(3) of ERISA. Pet. App. 6a. The Sereboffs responded that Mid Atlantic's claim sought "monetary damages [that are] not permissible" under ERISA. *Ibid.* The district court granted in part Mid Atlantic's summary judgment motion, holding that Mid Atlantic's

claim was cognizable under §502(a)(3) and that the plan was entitled to reimbursement of $74,869.37, plus interest. *Ibid.* The district court reduced the reimbursement award to account for the plan's prorated share of the reasonable attorneys' fees and court costs from the California litigation. *Id.*, at 7a.

The Fourth Circuit affirmed, agreeing that the basis of Mid Atlantic's claim and the remedy sought were equitable in nature. The court of appeals explained that Mid Atlantic's action was for equitable restitution because the disputed funds "have not been dissipated and . . . are specifically identifiable," "belong in good conscience" to Mid Atlantic, and "are within the possession and control of the Sereboffs." Pet. App. 11a, *Sereboff*, 407 F.3d, at 218-219. The court of appeals noted that "[r]ecent decisions by the Fifth, Seventh, and Tenth Circuits support our determination" that the plan's claim lies in equity. *Id.*, at 12a. The court of appeals also recognized that its ruling "appears to be at variance with recent decisions by the Sixth and Ninth Circuits." *Id.*, at 13a n.7. The Sereboffs' petition for panel rehearing and rehearing en banc was denied. This Court granted the Sereboffs' petition for a writ of certiorari on November 28, 2005.

SUMMARY OF THE ARGUMENT

Section 502(a)(3) of ERISA allows a plan fiduciary to obtain "appropriate equitable relief" to enforce the terms of an ERISA plan. The Court in *Great-West* suggested that a plan fiduciary could, consistent with certain traditional requirements of equity, enforce a subrogation-based reimbursement provision under §502(a)(3), explaining that a claimant seeking equitable restitution could properly impose a constructive trust or equitable lien on particular property in the defendant's possession belonging in good conscience to the claimant. 534 U.S., at 213-214.

Mid Atlantic sought relief that was "*typically* available in equity." *Id.*, at 210 (quoting *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 256 (1993)). Under long-established equity jurisprudence in the subrogation context, an insurer who indemnifies a loss has an equitable interest in any compensation that the insured later receives for that loss from a third-party tortfeasor. Indeed, the insured holds that recovery in trust for the insurer, who may recover it in a suit in equity. The remedies sought by Mid Atlantic—a constructive trust or an equitable lien—were quintessential equitable responses, and Mid Atlantic appropriately claimed entitlement to that relief under §502(a)(3). Given the equitable basis of Mid Atlantic's claims and the plain terms of the plan, the disputed funds belong in good conscience to the plan. The disputed funds are specifically identifiable proceeds from the tort settlement, and, unlike in *Great-West*, those funds are in the plan participants' possession.

Because the relief sought by Mid Atlantic was traditionally available in equity, the district court acted squarely within the jurisdiction authorized by §502(a)(3) in hearing and correctly deciding Mid Atlantic's claims.

ARGUMENT

I. SECTION 502(A)(3) AUTHORIZES SUITS SEEKING RELIEF THAT WAS TYPICALLY AVAILABLE IN EQUITY.

Section 502(a)(3) of ERISA authorizes a civil action "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates . . . the terms of the plan, or (B) to obtain other *appropriate equitable relief* (i) to redress such violations or (ii) to enforce any provisions of . . . the terms of the plan." §502(a)(3) (emphasis added). The Court explored the meaning of "appropriate equitable relief" in some detail in *Mertens* v. *Hewitt Associates*, which involved plan participants who sued an ERISA plan's actuary, a nonfiduciary, for damages resulting from an actuarial mistake that eventually

caused the plan's assets to be insufficient to cover the plan's benefit obligations. The Court held that Congress intended in §502(a)(3) to authorize only "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens*, 508 U.S., at 256. Accordingly, the Court categorically denied the type of relief—compensatory damages—sought against the plan actuary.[1]

Four years ago, the Court in *Great-West* revisited its comments in *Mertens* regarding restitution. The ERISA plan participant in the case, Knudson, was injured in a car accident, and the plan paid for her medical expenses, which totaled over $400,000. Later, Knudson filed a state-court tort action and settled with the third-party wrongdoer for $650,000. Unlike the Sereboffs, Knudson did not have possession of the tort settlement, which was instead placed in a special-needs trust. *Great-West*, 534 U.S., at 207-208.

In evaluating the plan's restitution claim, the Court reaffirmed that "the term 'equitable relief' in §502(a)(3) must refer to 'those categories of relief that were *typically* available in equity.'" *Id.*, at 210 (quoting *Mertens*, 508 U.S., at 256). The Court further noted that "whether [restitution] is legal or equitable in a particular case (and hence whether it is authorized by §502(a)(3)) remains dependent on the nature of the relief sought." *Id.*, at 215. A restitution claim is considered legal when the plaintiff "could *not* assert title or right to possession of particular property" but nevertheless "might be

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[1] Consistent with *Mertens*'s framework, the Court subsequently allowed "restitution against a transferee of tainted plan assets," holding that a fiduciary's action for restitution of plan assets or their proceeds in the hands of the transferee constitutes "appropriate equitable relief." *Harris Trust & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 250-253 (2000).

able to show just grounds for recovering money to pay for some benefit the defendant had received from him." *Id.*, at 213. A plaintiff seeks legal restitution when, in reality, it seeks "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." *Ibid.*

The Court suggested, however, that §502(a)(3) recognizes claims for *equitable* restitution. "[A] plaintiff could seek restitution *in equity* . . . where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Ibid.* The Court observed that equitable restitution generally comes "in the form of a constructive trust or an equitable lien." *Id.*, at 212-213. A constructive trust is used when the defendant has a legally recognized right in a particular asset, which may be a fund of money like a bank account in the defendant's possession that can be identified as belonging in good conscience to the plaintiff in spite of the defendant's legal right to it. See *ibid.* (citing 1 G. Palmer, Law of Restitution §§1.4, 3.7, at 17, 262 (1978)). Similarly, an equitable lien can be imposed to prevent or reverse an unjust enrichment and gives the plaintiff a security interest (unlike a constructive trust, which gives complete title) in the disputed property that can be executed to satisfy a money claim. See *ibid.*; 1 D. Dobbs, Law of Remedies §4.3(3), at 601 (2d ed. 1993).

Great-West's claim failed in that case because "the funds to which petitioners claim[ed] an entitlement under the Plan's reimbursement provision—the proceeds from the settlement of respondents' tort action—[were] not in respondents' possession." *Great-West*, 534 U.S., at 214. Unlike the claimed portion of the Sereboffs' settlement proceeds, which by stipulation remains in their investment accounts, Knudson's settlement proceeds were located in a special-needs trust that she did not possess. *Ibid.* In other words, the claim in *Great-West* was for legal restitution, reasoned the Court, because the

plan sought personal liability against Knudson rather than a right to possession of identifiable proceeds of the settlement in Knudson's possession. *Ibid.*

Because *Great-West* dealt narrowly with circumstances in which the plaintiff sought only legal restitution, the Court did not comprehensively prescribe the circumstances in which a claim for equitable restitution would fit within the confines of "appropriate equitable relief." Nonetheless, the Court indicated that a plan can obtain equitable relief to enforce the terms of a plan's subrogation provisions by establishing that it has a superior claim in equity and good conscience to specifically identifiable property in the hands of the defendant. *Id.*, at 213-214. Under those circumstances, "[a] court of equity [can] then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner." *Id.*, at 213.

Employers are under no obligation to provide medical benefit plans to their employees, and if they choose to do so, they have great latitude in the design of a plan of benefits. *Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822, 833 (2003); *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 78 (1995). Employers are therefore free to condition the payment of medical benefits on the plan's right to reimbursement in prescribed circumstances, as is the general practice outside the ERISA context. The only requirements imposed by ERISA for such provisions are that they be set forth in a "written instrument." ERISA §402(a), 29 U.S.C. §1102(a), and that participants be advised periodically of the terms of that instrument. ERISA §104(b), 29 U.S.C. §1024(b).

By authorizing both injunctive and "other appropriate equitable relief . . . to enforce any provisions of this subchapter or the terms of the plan," §502(a)(3) provides remedies for

violations of either the statute itself or the terms of a particular plan. Petitioners' assertion that any attempt to enforce the plan is a legal claim for breach of contract, rather than an equitable claim to enforce the terms of the plan, is both wrong as a matter of historical fact (as will be shown below) and produces a result that is at odds with the language of §502(a)(3) and with the overall structure of ERISA. In essence, petitioners argue that Congress held out the mere illusion of being able to enforce plan terms through equitable relief, because those attempts will always be inherently contractual, and hence legal and not equitable. But there is no reason to believe that Congress would have enacted a provision that expressly and unambiguously grants remedial relief that does not actually exist, rendering superfluous a key term of the statute.

If §502(a)(3) categorically bars the enforcement of plan subrogation and reimbursement terms because actions to enforce them inherently seek legal relief, then the phrase "enforce . . . the terms of the plan" is effectively read out of the statute, an outcome directly at odds with the Court's long-expressed "duty to give effect, if possible, to every clause and word of a statute." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (citations and internal quotation marks omitted).[2] The Court should not adopt an interpretation of a statute that produces an incongruous result. *United States* v. *Am. Trucking Ass'ns, Inc.*, 310 U.S. 534, 542-543 (1940).

The Fourth Circuit correctly concluded that the circumstances in which *Great-West* recognized that an equitable claim would lie under §502(a)(3) are precisely the circumstances of this case. Pet. App. 11a-12a. The plan paid the

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[2] The Court has recognized that the enforcement scheme embodied in §502 of ERISA is "one of the essential tools for accomplishing the stated purposes of ERISA." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 52 (1987).

Sereboffs' medical-expense claims and, consistent with the terms of the plan, became equitably subrogated to any third-party recovery. When the Sereboffs in fact recovered a sizeable settlement from the third-party tortfeasors, Mid Atlantic became entitled to a constructive trust or equitable lien on a portion of the proceeds from the Sereboffs' tort settlement, and that *res* both remains in the Sereboffs' hands and is identifiable as the proceeds of the settlement. Consequently, the funds sought by Mid Atlantic both belong to it "in equity and good conscience" and are in the Sereboffs' possession, bringing this case precisely within the scope of the equitable actions authorized by §502(a)(3).

II. THE BASIS OF MID ATLANTIC'S RESTITUTION CLAIM IS EQUITABLE IN NATURE.

Without expressly deciding the issue, the Court in *Great-West* was undoubtedly correct in suggesting that a plan's claims for reimbursement in this context would be equitable in nature if the plan sought to recover clearly traceable settlement funds in the defendant's possession. See *Great-West*, 534 U.S., at 213. Under well-settled equity jurisprudence in the insurance context, when an insurer has indemnified a loss and the insured subsequently receives compensation for that loss from a third-party tortfeasor, the insurer may assert equitable subrogation rights over that recovery. Because the plan's position is directly analogous to that of an indemnity insurer in the subrogation context, the plan's claim, too, is grounded in equity.[3]

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[3] As the Court noted in *Great-West*, the categorization of the plan's claims as legal or equitable "depends on 'the basis for the plaintiff's claim' and the nature of the underlying remedies sought." 534 U.S., at 213 (quoting *Reich* v. *Cont'l Cas. Co.*, 33 F.3d 754, 756 (CA7 1994)). This analysis is similar to that used by the Court to determine the right to a jury trial. See, *e.g.*, *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 42 (1989) ("First, we compare the statutory action to 18th-century actions

Subrogation-based rights are equitable. Their fundamental purposes are to prevent the unjust enrichment of the insured by a double recovery (once from the insurer and again by the third party) and to ensure that the wrongdoer is held ultimately responsible for the loss. See, *e.g.*, *Allstate Ins. Co.* v. *Ivie*, 606 P.2d 1197, 1202 (Utah 1980) ("Subrogation has a dual basis. . . . '[W]hen the insurer has made payment for the loss caused by a third party, it is only equitable and just that the insurer should be reimbursed for his payment to the insured, because otherwise either the insured would be unjustly enriched by virtue of a recovery from both the insurer and the third party, or in the absence of such double recovery by the insured, the third party would go free notwithstanding the fact that he has a legal obligation in connection with the damage.'" (quoting 16 G. Couch, Cyclopedia of Insurance Law §61.18, at 248-249 (R. Anderson ed., 2d ed. 1960))).[4]

When an insurer pays an insured's claim, the insurer acquires a subrogation right to reimbursement, and when the insured obtains a recovery for which the insurer is entitled to be reimbursed, usually in the form of settlement or judgment proceeds of a third-party suit, the insured holds that money in trust for the insurer,[5] who may recover the funds in a suit in

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brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.").

[4] See also *Great West Cas. Co.* v. *Manning*, 687 So.2d 416, 419 (La. App. 1996) (noting the equitable nature of reimbursement as "prevent[ing] the insured from obtaining double or multiple recovery by collecting from the insured the same damages or expenses it has recovered from the tortfeasor").

[5] *Comegys* v. *Vasse*, 1 Pet. 193, 215 (1828) (citing *Gracie* v. *New-York Ins. Co.*, 8 Johns. 237, 245 (NY 1811), and holding that, after the insurers have paid the loss, "any indemnity, however arising, is a trust for the underwriters"); *Randal* v. *Cockran*, 1 Ves. Sen. 98, 98, 27 Eng. Rep. 916, 916 (Ch. 1748) (Hardwicke, L.C.) (holding that insurer had "the plainest

equity.[6] A subrogation-based claim for reimbursement, unlike

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equity that could be" and explaining that, once the insurer provides indemnification, "the assured stands as a trustee for the insurer, in proportion for what he paid" for any losses "restored in specie, or compensation made for them"); *Blaauwpot* v. *Da Costa*, 1 Eden 130, 131, 28 Eng. Rep. 633, 634 (Ch. 1758) (ordering ship owner's executors to pay £1636 from compensation received from a third party for already-indemnified losses because "it was received by the executors . . . in trust for [the insurers]"); *Gracie*, 8 Johns., at 245 (explaining that insurer who pays indemnification has equitable interest on any compensation subsequently made for the loss, that whoever possessed that recovery would "become trustee for the party having the equitable title to the reimbursement," and that "[t]here would be no doubt of [insurer's] claim in equity"); *Leonard* v. *Nye*, 125 Mass. 455, 461-462, 466-467 (Mass. 1878) (recognizing that, once an insured receives indemnity for a loss, the insured will hold any subsequent compensation from a third party for that loss "in trust for" the insurer); 2 W. Phillips, Treatise on the Law of Insurance §1723, at 397 (5th ed. 1867) (maintaining that the payment of an insured's loss "gives the insurers an equitable title to what might be afterwards recovered from other parties on account of the loss"); *Ridenour* v. *Nationwide Mut. Ins. Co.*, 541 P.2d 1377, 1378 (Or. 1975) ("[F]unds coming to the insured for the insurer are regarded as trust funds."); *Regent Coop. Equity Exch.* v. *Johnston's Fuel Liners, Inc.*, 122 N.W.2d 151, 154 (ND 1963) (explaining that settled law "has in effect made the insured a trustee for the insurer to the extent of the insurer's interest").

[6] *Health Cost Controls of Ill., Inc.* v. *Washington*, 187 F.3d 703, 710-711 (CA7 1999) (describing an insurer's claim for reimbursement of medical expenses paid for its insured as "securely equitable and so within the jurisdiction conferred . . . by ERISA" and imposing a constructive trust on identifiable escrowed insurance payments); *Monmouth County Mut. Fire Ins. Co.* v. *Hutchinson*, 21 N.J. Eq. 107, 116-117 (NJ 1870) (explaining that "it is settled" that an insured who receives insurance indemnity and afterwards receives "the amount from the [wrongdoer] in satisfaction of his damages . . . *holds it in trust for the insurers, and they may recover it from him by a suit in equity*" (emphasis added)); 8 G. Couch, Cyclopedia of Insurance Law §2002, at 6606 (1931) (explaining that when an insurance company has paid the insured for losses caused by a third party "and the insured afterwards receives that amount from the tortfeasor in satisfaction of his damages, he holds that amount in trust for the insurer, *who may recover it in a suit in equity*" (emphasis added)).

a breach-of-contract claim, limits recovery to the amount received for the particular loss that the insurer has already indemnified, and the insurer must assert its equitable claim on particular assets that are clearly traceable to the compensation received from a third party for that loss. The equitable, substantive right to subrogation has prevailed in every period in the history of equity jurisprudence and therefore was, without doubt, "*typically* available in equity." *Great-West*, 534 U.S., at 210 (quoting *Mertens*, 508 U.S., at 256).

In one of the "standard current works" on equitable remedies, *Great-West*, 534 U.S., at 217, Professor Palmer confirms that an insurer's subrogation-based rights are driven by the fundamentally equitable concern to prevent or reverse unjust enrichment, rather than to make the insurer whole through breach-of-contract damages:

> "When the insurer's case is based upon the subrogation right . . . several cases have taken the position that the insurer has a lien on the proceeds of the insured's recovery. . . . This is not an express lien based on agreement, but instead is an equitable lien impressed on moneys on the ground that they ought to go to the insurer. They ought to go to the insurer only because of its subrogation right, and that right is to recover medical expense from the tortfeasor to the extent that the insurer has paid such expense. *If the insured has recovered from the tortfeasor for such expense, the net amount of such recovery, after subtracting the cost of collection, ought to go to the insurer, and this is the extent of its lien.*" 4 Palmer, *supra*, §23.18(d), at 470 (emphasis added).

That passage, in addition to describing the equitable concern with unjust enrichment, makes clear that there is no merit in petitioners' suggestion that a plan cannot assert an equitable right to tort recoveries in the beneficiary's possession. Pet. Br. 28-29.

Petitioners' bald assertion that equity would have permitted the plan to pursue its subrogation rights against the third-party tortfeasors, presumably by intervening in petitioners' state-court suit, but does not permit an equitable action against the insured, *ibid.*, is particularly significant because it constitutes a concession that the plan had equitable subrogation rights that it could have enforced against the third-party tortfeasors. With that concession, petitioners' argument is reduced to the assertion that equity jurisdiction would govern a direct action against the third-party wrongdoer, but somehow could not reach an insured who holds identifiable proceeds that in good conscience belong to the insurer. But, as has been seen, the entire doctrine of equitable subrogation was built around the concept that the insured held any recovery in trust for the subrogated insurer, and even the earliest cases recognizing an insurer's equitable subrogation rights arose in the context of an equitable claim to money or property that had come to or was claimed by the insured. *Comegys*, 1 Pet., at 214-219; *Gracie*, 8 Johns., at 245; *Da Costa*, 1 Eden, at 131. Petitioners simply ignore the numerous cases permitting an insurer to seek equitable recovery from an insured who held identifiable proceeds subject to the insurer's subrogation rights. See, *e.g.*, cases cited *supra* notes 5 & 6.

Petitioners quibble with terminology in asserting that the plan's claim "is *not* a subrogation claim" but is instead a claim for reimbursement. Pet. Br. 28-29. Petitioners' semantic distinctions do not in the least affect the equitable nature of the substantive remedies that the plan claims, and neither Dobbs nor Black's Law Dictionary in describing the most common form of subrogation could reasonably be read to so cabin the limits of equity jurisdiction. Early cases do not even make the distinction, describing the insurer's action against its insured as part of the insurer's subrogation rights or simply holding that the insured held the third party's payment in trust for the insurer. See, *e.g.*, *Comegys*, 1 Pet., at

214-219; *Gracie*, 8 Johns., at 245; *Hutchinson*, 21 N.J. Eq., at 116-117; *Da Costa*, 1 Eden, at 131.[7] Although some modern cases draw a formal distinction between "subrogation" (claiming against the third party) and "reimbursement" (claiming against the insured for a portion of the compensation received from the third-party wrongdoer), they still recognize that the substantive reimbursement right against the insured is equitable in nature.[8] See, *e.g.*, *Swartzendruber*, 570 N.W.2d, at 712; *Manning*, 687 So.2d, at 419; *Provident Life & Accident Ins. Co.* v. *Williams*, 858 F.Supp. 906, 912 (WD Ark. 1994). Whether the right to reimbursement is securely encompassed in the definition of subrogation or is instead a parallel, equitable sibling springing from the right to subrogation, the outcome is the same: after providing indemnification

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[7] See also *Cont'l W. Ins. Co.* v. *Swartzendruber*, 570 N.W.2d 708, 712 (Neb. 1997) (explaining that reimbursement is "encompassed within the concept of subrogation"); *Newcomb* v. *Cincinnati Ins. Co.*, 22 Ohio St. 382, 387-388 (Ohio 1872) (explaining that if, after receiving indemnity from the insurer, the insured obtains from the wrongdoer "any sum for which, in equity and good conscience, he ought to account to the underwriter, reimbursement will, to that extent, be compelled in an action by the latter, *based on his right in equity to subrogation*" (emphasis added)); 4 Palmer, *supra*, §23.16(b), at 444 (observing that subrogation may be "asserted *against the tort victim*, by reason of the fact that he has recovered money from the alleged tortfeasor, whether through settlement or judgment" (emphasis added)); R. Goff & G. Jones, The Law of Restitution 391 (1966) (noting that although subrogation "is normally exercised by the insurer taking action against a third party" in the assured's name, it may also be that "the insurer wishes to recover from the assured money which has already come into the assured's hands" and that "[i]t is settled that money received by the assured to which the insurer is entitled to be subrogated is held by the assured as trustee for the insurer").

[8] The Court has not treated the distinction, if there is one, as being important. See *FMC Corp.* v. *Holliday*, 498 U.S. 52, 54-56 (1990) (describing a reimbursement agreement and demands for reimbursement as dealing with rights to subrogation); *Memphis & L.R.R. Co.* v. *Dow*, 120 U.S. 287, 301-302 (1887) (using "reimbursement" to mean the payment made to the subrogated party to satisfy its right to equitable subrogation).

for a loss, an insurer has a substantive equitable right to recover a share of the compensation paid by a tortfeasor to the insured for that loss, and the insured holds that recovery in trust for the insurer.[9] See cases cited *supra* notes 5 & 6. Thus, by obvious analogy, the reimbursement right that the plan asserts over a portion of the plan participants' settlement proceeds is equitable in nature.[10]

Seemingly oblivious to the long history of equitable restitution in similar circumstances, the Sixth and Ninth Circuits have misperceived the nature of the claimed rights and remedies in concluding that subrogation claims under §502(a)(3) are legal rather than equitable because they seek to give effect *to a contract* and ultimately *seek money*. See *Qualchoice*, 367 F.3d, at 649-650; *Vonderharr*, 384 F.3d, at 672-673. Equity jurisprudence has historically recognized insurers' equitable rights over funds paid to compensate the insured for already-indemnified losses precisely *because of* the nature of the indemnity contract, and the concern that a plan's reimbursement rights may arise from contract ignores that

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[9] Moreover, petitioners cannot justly insist that the plan's failure to intervene caused a forfeiture, because petitioners failed to notify Mid Atlantic of the pending settlement, ignoring Mid Atlantic's repeated requests for changes in the status of the litigation that could prejudice its "subrogation lien[s]." Joint App. 87-106, 121-128. Petitioners' decision to breach their obligations to "provide information" requested by the plan makes working a forfeiture against the plan inequitable. Joint App. 36.

[10] Some jurisdictions have statutorily or administratively limited remedies that were typically available in equity, but that does not change the fact that the enforcement of subrogation rights was typically available in equity. Compare *Ivie*, 606 P.2d, at 1201-1203 (interpreting Utah's no-fault insurance act as preserving some "subrogation-like rights of reimbursement among no-fault insurers" but limiting an insurer's traditional subrogation rights against the tortfeasor and the insured), with *id.*, at 1204-1205 (Hall, J., dissenting) (criticizing the majority's statutory interpretation as an unwarranted "departure from long-established principles of subrogation").

§502(a)(3) clearly contemplates the provision of "equitable relief" to "redress such violations or . . . to enforce any provisions of . . . the terms of" employee-benefit contracts. §502(a)(3).[11] Stripped to its essentials, petitioners' argument means that a plan fiduciary would never be able to assert an equitable claim to enforce the terms of a plan under §502(a)(3) because the asserted right will spring from the plan itself. A plan fiduciary's route into federal court, after all, is by suing to enforce (or to redress violations of) the terms of an ERISA plan. The fact that a plan's claim might be, in this trivial sense, "contractual" does not prevent the claim from being equitable in nature.[12] *Scholastic Corp.*, 389 F.Supp.2d, at 411-413.

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[11] "The right of subrogation is not founded on contract. *It is a creature of equity*; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties." *Dow*, 120 U.S., at 301-302 (emphasis added); see also *United States* v. *California*, 507 U.S. 746, 759 (1993) ("[T]he doctrine of subrogation is one of equity."); *Garrison* v. *Memphis Ins. Co.*, 19 How. 312, 317 (1856); *Standard Accident Ins. Co.* v. *Pellecchia*, 104 A.2d 288, 293 (NJ 1954) (holding that subrogation rights do not arise out of contract but exist even without the consent of the insured, although the assured and the insurer may waive or limit the rights by agreement); *Ill. Sur. Co.* v. *Mitchell*, 197 S.W. 844, 845 (Ky. 1917) ("The right of subrogation rests not upon contract, but upon the principles of natural justice.").

An equitable right to subrogation may exist whether or not there is an explicit subrogation clause in the indemnity agreement. See, *e.g.*, *Liverpool & G.W. Steam Co.* v. *Phenix Ins. Co. (THE MONTANA)*, 129 U.S. 397, 462 (1889) (holding that the insurer's subrogation right arises without regard to whether the insurance contract contains a subrogation provision); *Williams*, 858 F.Supp., at 912 (holding that an equitable right to reimbursement exists even when the written ERISA plan lacks an explicit reimbursement provision).

[12] To disqualify every §502(a)(3) claim that derives from contract would also prevent even injunctive awards, since they, too, seek to enforce and protect the parties' rights under the plan.

Moreover, the equitable basis of the plan's reimbursement action allows the plan to assert proprietary rights in a portion of petitioners' settlement proceeds without first demonstrating the inadequacy of legal remedies. *Garrison*, 19 How., at 317 (rejecting argument that the insurer's subrogation suit "should have been at law, in the name of the assured—the remedy being adequate and complete" and explaining that "'the plaintiff had the plainest equity that could be'" (quoting *Randal*, 1 Ves. Sen., at 98)); *Hutchinson*, 21 N.J. Eq., at 116-118 (rejecting argument (identical to petitioners') that indemnity insurers claiming reimbursement against an insured must first seek a remedy at law); see also *Wylie* v. *Coxe*, 15 How. 415, 420 (1853) ("There may be a legal remedy, and yet if a more complete remedy can be had in chancery, it is a sufficient ground for jurisdiction.").[13] In other words, when subrogation claimants have an equitable substantive right to a constructive trust, as in this case, their claims are not subject to an adequate-remedy rule.[14] Thus, petitioners' assertion that the plan may have a claim for money had and received (for legal restitution), even if true,

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[13] Even if it had been proper to argue the adequacy of a legal remedy in this context, petitioners waived that issue by failing to raise it in the district court, in the court of appeals, or in their petition for certiorari. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 34 (2001) ("We do not reach this issue because it was not raised or briefed below."); *Brown, Bonnell & Co.* v. *Lake Superior Iron Co.*, 134 U.S. 530, 536 (1890) (holding that defendant waived adequate-remedy objection, which should have been taken "at the earliest opportunity"); *Wylie*, 15 How., at 420 (holding that "[i]t is too late to raise [an adequate-remedy] objection on the hearing in the appellate court").

[14] 1 Dobbs, *supra*, §2.5(1), at 129; *Heckmann* v. *Ahmanson*, 214 Cal. Rptr. 177, 187 (Cal. App. 1985) ("In California, as in most jurisdictions, an action in equity to establish a constructive trust does not depend on the absence of an adequate legal remedy. . . . Only where the constructive trustee has dissipated the fund that would constitute the res of the constructive trust is it proper to award a judgment for money damages.").

does not defeat its right to assert the equitable remedies of constructive trust or equitable lien (for equitable restitution).[15]

Even if there were a significant adequate-remedy requirement for subrogated plans, a court must be convinced that the legal remedy is at least equal to the remedy that could be obtained in equity before denying equitable relief. *Terrace* v. *Thompson*, 263 U.S. 197, 214 (1923). Section 502(a)(3)'s limitations on legal relief constitute a sufficient impediment to the exercise of any legal remedy otherwise available to the plan, thus overcoming any adequate-remedy limitation on equitable relief. See *Garrison*, 19 How., at 317 (holding that "an insurer may apply to equity *whenever* an impediment exists to the exercise of his legal remedy" (emphasis added)). Indeed, there is no small irony in petitioners' assertion that the plan's equitable rights are barred by the so-called adequacy of a legal remedy whose absence from the statutory scheme requires the plan to look to equity in the first place. In any event, the legal remedy that petitioners characterize as adequate is clearly not as practical and efficient as an equitable remedy. *Terrace*, 263 U.S., at 214; *Wylie*, 15 How., at 420. In addition to the fact that petitioners' asserted legal remedy, if not preempted,[16] would be against different parties

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[15] Contrary to petitioners' suggestion, Pet. Br. 21-22, *Games* v. *Miller*, 111 U.S. 395 (1884), does not limit the availability of equitable relief to insurers exercising their subrogation rights over specifically identifiable funds. Unlike this case, the claimant in *Games* had not averred "any ground of equity jurisdiction" and had not alleged a trust or lien on the decedent's estate, there was no property remaining that was traceable to the wrongly obtained funds, and the claimant had ratified the transaction and was therefore bound by an earlier judgment involving the decedent. *Id.*, at 398-399.

[16] The Court did not reach preemption issues in *Great-West*, 534 U.S., at 220. Given that the adequate-remedy principle does not apply in the insurance-subrogation context (and, independently, that the plan's legal remedy, if it even has one, is not as practical and efficient as an equitable one), the Court need not address preemption issues in this case, either.

in different venues, petitioners would nonsensically require health plans to intervene in every single case involving a claim by a plan participant against a third party.[17] Even if they could, in most instances there is never a lawsuit in which the plan could intervene because the plan participant settles with the third party (who is usually insured) without filing suit, preventing the plan from having any third-party remedy at all. It is better to permit plans to reserve legal action only for those who choose to disregard their reimbursement obligations. The remedial alternative proposed by petitioners is clearly not plain, adequate, and complete.

Rather than seeking personal financial liability from the participants, Mid Atlantic asserts an equitable right to a limited portion of a settlement paid to the participants from a third-party tortfeasor—an extant enrichment in petitioners' possession that belongs in good conscience to the plan. As already described, that right is firmly rooted in equity. The plan's memorialization of historical subrogation rights in the documents governing the plan, consistent with ERISA's written-instrument requirements, §402(a), is not properly classified as creating a purely contractual right to reimbursement, but rather as an expression of venerable equitable principles that, in this case, entitle the plan to a constructive trust or an equitable lien. Far from relying on the formalism of labels, the plan's claims substantively sound in equity.

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[17] In addition to being legally wrong, it would be bad policy to require plans to intervene, if they even could, in every third-party suit in which they claim a subrogation right. Most plan participants honor their obligations to reimburse their plans for medical benefits paid on their behalf without the need for filing a lawsuit. Allowing participants the opportunity to honor their plan obligations without requiring legal action by the plan for fear of losing its subrogation rights not only is supported by a long history of equity jurisprudence but also makes more economic sense than requiring plans to needlessly file thousands of unnecessary lawsuits every year.

III. Mid Atlantic Appropriately Asserted the Equitable Remedies of Constructive Trust and Equitable Lien.

The remedies sought by Mid Atlantic—a constructive trust or, alternatively, an equitable lien—are quintessential equitable remedies, see, *e.g.*, Restatement of Restitution §4(c), (d) (1937); *Great-West*, 534 U.S., at 213, and Mid Atlantic appropriately claimed entitlement to that relief under §502(a)(3). As the Court noted in *Great-West*, constructive trust is a traditionally equitable remedy that may lie for "money or property" that (1) is "identified as belonging in good conscience to the plaintiff," (2) can "clearly be traced to particular funds or property," and (3) is "in the defendant's possession." 534 U.S., at 213.

The Court indicated that the requirements for obtaining an equitable lien are essentially identical to those for constructive trust. *Ibid.* There are, however, cases from the Court tending to favor the award of an equitable lien when, as in this case, the equitable basis of the obligation is an agreement "aimed" at a particular "fund." See *Barnes* v. *Alexander*, 232 U.S. 117, 121-122 (1914); see also *Wylie*, 15 How., at 420; 4 Palmer, *supra*, §23.18(d), at 470. Like the contingency-fee arrangement in *Barnes*, the plan agreement obligated the Sereboffs to pay Mid Atlantic its portion of the settlement proceeds "if, when, and as soon as [they] should receive an identified fund." 232 U.S., at 121. Contrary to petitioners' assertion, Pet. Br. 25-26, it is "not necessary to consider whether the lien attached to what we have called the *res* . . . before the fund was received," because it "is enough that it attached not later than that moment." *Id.*, at 122. Justice Holmes, writing for the Court, held that the attorney, like Mid Atlantic in this case, had "a lien upon the fund, as

soon as it was identified [and] could follow it into the hands" of the party to be charged. *Id.*, at 123.[18]

Thus, because the disputed funds belong in good conscience to the plan, are specifically identifiable, and are in petitioners' possession, Mid Atlantic properly sought and obtained an equitable lien over the funds. In any event, Mid Atlantic's claims satisfy the equitable remedial requirements for both a constructive trust and an equitable lien.

A. The Disputed Portion of the Settlement Proceeds Belongs in Good Conscience to the Plan.

Petitioners do not seriously dispute that the escrowed funds belong in good conscience to the plan, Pet. Br. 21, both because the plan provision establishing the plan's right to reimbursement provides a source of the plan's right to the settlement proceeds and because, as described previously, that right was typically available in equity. See *supra* notes 5 & 6 (citing cases establishing that beneficiary holds recovery in trust for the plan).

B. The Money Sought by Mid Atlantic Is Clearly Identifiable and Traceable to the Settlement Funds.

The money the plan seeks, $74,869.37 (minus a pro rata allowance for reasonable attorneys' fees), is specifically identifiable as proceeds from the tort settlement. Joint App. 39, 41-42, 69; see Pet. Br. 23 (conceding that the funds are "specifically identifiable"). That portion of the fund represents the amount that the plan paid the Sereboffs' health-care providers for past medical expenses. The plan provides that when a participant "receives benefits and [has] a right to

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[18] Justice Holmes suggested that a constructive trust might also be proper. See *Barnes*, 232 U.S., at 121 ("And it is one of the familiar rules of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing.").

recover damages from a third party, the Company is subrogated to this right. All recoveries from a third party . . . *must be used* to reimburse the Company." Joint App. 35-36 (emphasis added). Thus, the plan document itself specifically identifies the property ("[a]ll recoveries from a third party") to which the plan has a superior equitable interest arising from the plan's payment of benefits and the petitioners' obligation to reimburse the plan. *Great-West*, 534 U.S., at 213; *Barnes*, 232 U.S., at 122. The plan's payment of petitioners' medical expenses gave it a right to subrogation from the property specifically identified by the plan document—the potential proceeds from claims against third-party tortfeasors—and reimbursement from the proceeds held by petitioners. The district court found, based on stipulated facts, that the "plaintiff (an ERISA fiduciary) seeks to recover funds that . . . are 'specifically identifiable' . . . because they were paid to the Sereboffs and their attorney on behalf of the tortfeasors . . . [and] 'are within the possession and control of the defendant beneficiary' (because the Sereboffs . . . have segregated the claimed monies in an investment account to abide the result of this lawsuit)." Pet. App. 31a. Those factual findings, ultimately affirmed by the court of appeals, *Sereboff*, 407 F.3d, at 218-219, are not reviewable in this Court, *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996), and independently justify Mid Atlantic's right to pursue its claims in federal court under §502(a)(3).

Petitioners' contention that the settlement with the tortfeasors did not designate which portion of the settlement was attributable to their past medical expenses, Pet. Br. 34, is not properly before the Court because it is relevant, if at all, only to the quantum of the recovery, not to whether Mid Atlantic was entitled to bring its suit in federal court. Petitioners had ample opportunity to convince the district court to restrict the plan's recovery and failed to do so. Petitioners sought to recover their "hospital and medical expenses" in their state-court suit, Joint App. 82, and the subrogation recovery

represents less than one-tenth of petitioners' total recovery. Petitioners were fully aware of the amount of Mid Atlantic's asserted liens for their past medical expenses, which were the particular losses against which they were indemnified.[19]

Further, petitioners never provided Mid Atlantic with a copy or explanation of their settlement. And, lacking Mid Atlantic's consent, petitioners would have contravened equitable principles (which are expressly embodied in the plan agreement) if they had accepted a settlement amount that was insufficient to satisfy Mid Atlantic's subrogation liens, of which petitioners had multiple notices. Joint App. 36, 87-106, 121-128. For these reasons, and because petitioners concede that it is true that the funds in question belong in good conscience to the plan "as a matter of fairness," Pet. Br. 21, petitioners cannot reasonably argue that their unjust enrichment is not specifically identifiable.[20]

Likewise, petitioners cannot show that Mid Atlantic failed to satisfy any applicable "tracing" requirement for constructive trusts. Contrary to petitioners' arguments, Mid Atlantic does not have to show that petitioners possess the "particular

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[19] Petitioners cannot resist a constructive trust by arguing that the $750,000 settlement did not compensate them for all of their losses. The terms of the plan make clear that the plan has a "right to recover any payments" made to a plan participant by a third party" and that "[a]ll recoveries from a third party (whether by lawsuit, settlement or otherwise) must be used to reimburse the Company." Joint App. 35-36. Moreover, the plan makes clear that the plan's share of the recovery will not be reduced because the participant "has not received the full damages claimed, unless [the plan] agree[s] in writing to a reduction." *Id.*, at 36. At minimum, the settlement compensated petitioners for the loss for which they had been indemnified. See 4 Palmer, *supra*, §23.16(b), at 444.

[20] The risk of gamesmanship by insureds in settling cases and then arguing that the settlement was attributable to only those categories of damages not subject to subrogation rights is precisely what created the need for plan or policy language requiring first-dollar reimbursement.

money that the Plan paid to the Sereboffs." Pet. Br. 20.[21] Petitioners' irrational full-circle theory of tracing, if adopted in the subrogation context, would instantaneously destroy the entire doctrine of equitable subrogation because, by definition, the recovery from the third-party wrongdoer is never the same *res* or funds used to satisfy the claim.[22] Although that different form of tracing may be appropriate in other circumstances, *i.e.*, when a defendant has taken the plaintiff's property and later sold or exchanged it, that theory is not, and never has been, the relevant tracing rule when analyzing subrogation-based rights.[23] Petitioners do not cite a single case suggesting that full-circle tracing is required in the subrogation context, and the reason is that two hundred years of equity jurisprudence say otherwise. See, *e.g.*, *Comegys*, 1 Pet., at 214-219; *Da Costa*, 1 Eden, at 131 (ordering the executors to pay £1636 from their prize money because "it

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[21] Rather than requiring claimants to *trace* the proceeds strictly from assets once belonging to them into the specific fund they seek (as petitioners inaccurately argue), a constructive trust in the insurance-subrogation context requires the insurer to specifically *identify* proceeds representing compensation for the loss that the insurer has indemnified. See D. Laycock, Modern American Remedies 673-674 (3d ed. 2002).

[22] Petitioners' tracing theory is belied by their assertion that Mid Atlantic could have sought recovery from the third-party tortfeasor. Pet. Br. 21. If true, then it is undisputed that Mid Atlantic successfully traced the funds from the third-party tortfeasors into petitioners' hands.

[23] Petitioners' reliance on Professor Dobbs's work in this regard is misplaced because Dobbs was speaking of a different context, *i.e.*, when a party has taken another's money, in suggesting that the funds must be traced back to the plaintiff. Professor Palmer explains that the term "restitution" is "not wholly apt since it suggests restoration to the successful party of some benefit obtained by him." 1 Palmer, *supra*, §1.1, at 4. That understanding of tracing, although describing many cases, wrongly ignores the "cases in which the successful party obtains restitution of something he did not have before, for example a benefit received by the defendant from a third party which justly should go to the plaintiff." *Ibid.*

was received by the executors . . . in trust for [the insurers]"); see *supra* notes 5 & 6.

Nor has petitioners' cramped interpretation of traceability ever been the rule in other, similar contexts. In *Barnes* v. *Alexander*, the fund received from the third-party defendant obviously did not find its source in the attorney's own bank account. 232 U.S., at 121-122. The attorney's interest arose because he performed services required under an agreement with his client. But those services gave rise to an equitable claim to a share of the funds that the agreement specifically identified as the potential source from which the attorney would be paid. *Id.*, at 122; see also *Wylie*, 15 How., at 420 (recognizing that a contractual obligation to pay an attorney out of specific funds creates a lien on those funds that may be enforced through a suit in equity); *Pearlman* v. *Reliance Ins. Co.*, 371 U.S. 132, 133-142 (1962) (awarding general contractor's surety a "superior right and title [over the trustee in bankruptcy] to a fund withheld by the [landowner] out of earnings due the contractor" when the surety paid the subcontractors, even though the money in the fund was not traceable to the surety's payments to the subcontractors).

C. The Disputed Funds Are in Petitioners' Possession.

The disputed funds or property must be in the defendant's possession, a requirement that is indisputably met in this case. Pet. Br. 23 (conceding that the funds are within petitioners' "possession and control"). In *Great-West*, the plan sued the plan participants, even though they did not possess the proceeds from the tort settlement. That posed an insuperable bar to recovery because it revealed that the plan sought personal liability against the plan participants rather than an equitable remedy over specific proceeds. 534 U.S., at 214; see also *Bauhaus USA, Inc.* v. *Copeland*, 292 F.3d 439, 445 (CA5 2002) (finding suit not equitable when funds were in

court registry and not in possession of defendant).[24] No such bar exists in this case because Mid Atlantic seeks to recover the identifiable settlement proceeds that the defendants have segregated and maintained in their investment accounts pending appeal. Joint App. 39, 41-42, 69.

IV. The Remedies Sought Are Appropriate Because They Were Typically Available in Equity, and Policy Considerations Strongly Favor Allowing the Claims.

Mid Atlantic's action for equitable restitution is appropriate because it seeks relief that was "*typically* available in equity." *Great-West*, 534 U.S., at 210 (quoting *Mertens*, 508 U.S., at 256), and because Congress has not elsewhere provided adequate relief to enable the plan to enforce its equitable rights under the plan when a beneficiary refuses to fulfill its clear reimbursement obligations. See *Varity Corp.* v. *Howe*, 516 U.S. 489, 515 (1996) ("[W]e should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate' [under section 502(a)(3)].").

Because Mid Atlantic's restitution claims fall within the strict confines of equity jurisdiction, the Court may also give due regard to ERISA's trust-like character. *Ibid.* The Court has recognized that "ERISA abounds with the language and terminology of trust law . . . and [makes] applicable . . . certain principles developed in the evolution of the law of trusts." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110-111 (1989). Petitioners' persistence in refusing to recognize the equitable character of actions to enforce the terms of ERISA plans leads them to ignore the substantial distinctions

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[24] The Court expressed no opinion "whether [the plan] could have obtained equitable relief against [the plan participants'] attorney and the trustee of the Special Needs Trust." *Great-West*, 534 U.S., at 220

between the common law of contracts, which developed in the law courts, and the equity jurisprudence governing the oversight and enforcement of trust documents, which developed in the courts of chancery. See G. Bogert & G. Bogert, The Law of Trusts and Trustees §17, at 215 (rev. 2d ed. 1984). Most important, the means of enforcing trust terms and the duties arising under trusts was historically the exclusive province of the equity courts, which applied their own rules of construction and devised their own means of enforcing their decrees that were distinctly different from those of the law courts. *Mertens*, 508 U.S., at 256.

Additional policy considerations strongly favor allowing Mid Atlantic's claims. Preventing the unjust enrichment of a plan participant who would otherwise recover twice for the same loss is an entirely fair rule.[25] Petitioners irrationally lament that allowing suits for equitable restitution under §502(a)(3) will make plan fiduciaries "whole" at the expense of their beneficiaries who may in some cases be left "in part." Pet. Br. 34. In doing so, they ignore that the operation of the subrogation doctrine ensures that the plan participant receives a full indemnity, but not more than indemnity, for the particular losses covered by a plan. The possibility of an incomplete recovery from a third-party tortfeasor already exists, and the plan's provision of benefits subject to equitable subrogation leaves the beneficiary in no worse position than if she had to rely solely on the third-party suit.

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[25] "In this case, [the plan] did not agree to indemnify [petitioners] for pain or suffering or disability. Yet, denial of its [reimbursement] claim for medical expenses because [petitioners] had not also recovered for other elements of damage would have the effect of making [the plan] an insurer against those losses as well. This would be a windfall to [a plan participant] who has not paid for such protection." *Ludwig* v *Farm Bureau Mut Ins Co*., 393 N.W 2d 143, 147 (Iowa 1986).

Moreover, petitioners' argument that the equitable relief in this case is not appropriate because the plan language does not ensure that the beneficiary is made whole, Pet. Br. 33-34, is not properly before the Court because, even if the argument could be made to apply, it addresses only the amount of the recovery, not whether a court could grant a recovery at all. In any event, no federal court of appeals has ever suggested that an ERISA plan's subrogation-based reimbursement right may be cut off on that basis. To the contrary, several federal courts of appeals have noted that this make-whole argument has no place in the enforcement of a plan's subrogation rights,[26] and certainly cannot override the plain language of an ERISA plan.[27]

Petitioners' make-whole arguments also fail both as a matter of corrective justice and as a matter of efficiency. Pet. Br. 34. For example, a plan participant might receive $10,000 for medical expenses from the plan and another $10,000 for the same medical expenses from the wrongdoer. But if, for whatever reason, the plan participant recovers only $50,000 from the wrongdoer when she feels that $100,000 was appropriate, then she might reason that she should be able to use the extra $10,000 in medical-expense payments to

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[26] *Harris* v. *Harvard Pilgrim Health Care, Inc.*, 208 F.3d 274, 280-281 (CA1 2000); *Waller* v. *Hormel Foods Corp.*, 120 F.3d 138, 140 (CA8 1997); *Sunbeam-Oster Co., Inc. Group Benefits Plan for Salaried & Non-Bargaining Hourly Employees* v. *Whitehurst*, 102 F.3d 1368, 1377-1378 (CA5 1996); see also *Kress* v. *Food Employers Labor Relations Ass'n*, 391 F.3d 563, 568-569 (CA4 2004). In addition to citing fairness and efficiency arguments, some of those courts of appeals have correctly concluded that adopting a make-whole rule would be a disservice to ERISA's requirement of straightforward language. *Harris*, 208 F.3d, at 280; *Whitehurst*, 102 F.3d, at 1374-1376.

[27] *Cagle* v. *Bruner*, 112 F.3d 1510, 1521 (CA11 1997); *Cutting* v. *Jerome Foods, Inc.*, 993 F.2d 1293, 1297 (CA7 1993); *Barnes* v. *Indep. Auto. Dealers Ass'n of Cal. Health & Welfare Benefit Plan*, 64 F.3d 1389, 1394-1395 (CA9 1995).

reduce the corrective-justice deficit from $50,000 to $40,000. The extra $10,000 in medical-expense payments that the injured plan participant wants to use to offset her pain and suffering would have to come from the plan and, ultimately, other plan beneficiaries. See *Cutting*, 993 F.2d, at 1298 (observing that rejection of the make-whole approach in favor of unequivocal reimbursement rights has the effect of reducing costs for plan participants and their beneficiaries and enabling them to obtain more coverage, "in effect trading an uncertain bundle of tort rights for a larger certain right, which is just the sort of trade that people seek through insurance"). That subrogation or reimbursement recovery would be wrongly taken from the plan, since under both equity and the plan agreement, it should have been the plan's.[28]

Despite petitioners' uninformed claims to the contrary, plans do calculate expected subrogation recoveries in setting premiums, and, consequently, increased costs would have to be borne by the other members of the plan. *Harris*, 208 F.3d, at 280-281 ("Although plan members like the Harrises would benefit financially, ultimately the costs would be borne by all other plan members in the form of higher premiums for coverage."). That is fundamentally unfair to members of any ERISA plan.[29] Preventing self-funded plans, like the one in this case, from recovering equitable restitution can be especially damaging to small employers. Subrogation reduces the

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[28] Petitioners and the commentator on whom they rely, Pet. Br. 34, cite no authority, for there is none, for the extraordinary proposition that a court may decline to enforce a plan as a means of transferring to the plan the obligations of a third-party tortfeasor who cannot make the beneficiary whole. See *supra* note 25.

[29] "Co-beneficiaries are owners of equitable interests in the same res . . . . They are in a fiduciary relation to each other in the sense that one beneficiary may not secretly secure for himself a special advantage in the trust administration." G. Bogert & G. Bogert, The Law of Trusts and Trustees §191, at 478 (rev. 2d ed. 1979).

costs of health-care coverage by allowing ERISA plans to use recoveries to pass on savings to employers and employees in the form of lower health-care costs. Enforcing the kind of subrogation rights at issue in this case not only prevents the participants' unjust enrichment but also helps protect the financial viability of employer-sponsored plans. Despite petitioners' claims to the contrary, allowing subrogation does not entitle insurers to a double recovery by collecting both premiums and subrogated amounts. The insurer assumes the very real risk of unpaid losses, which is the risk at the heart of indemnity insurance. Losses that have been compensated, such as the Sereboffs' medical expenses, should not fall on the shoulders of the employer's self-funded plan; they should be recovered for the benefit of other ERISA-plan participants, beneficiaries, and employers.[10]

Petitioners' approach is also economically inefficient because—to the extent the plan participant is in reality not made whole—it burdens the plan with a cost that the wrongdoer should have been forced to internalize. And, contrary to petitioners' argument, a rule allowing subrogation suits under §502(a)(3), when necessary (and they usually will not be), is more efficient and uses fewer judicial resources than a rule denying §502(a)(3) suits for equitable subrogation. Application of the make-whole rule, in contrast, would require cases that would have settled to be litigated anyway to determine what amount of damages would make the plan participant whole. *Harris*, 208 F.3d, at 281.

But despite the policy considerations favoring Mid Atlantic, in the final analysis, it is important that policy arguments "be directed to [a plan's] trustees, or to Congress, rather than

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[10] Furthermore, placing additional restrictions on a plan's ability to enforce reimbursement provisions "would surely discourage plan sponsors from providing the very sorts of accident and sickness benefits" that the plan offered to petitioners. *Knieval*, 391 F.3d, at 569-570.

to the federal courts." *Kress*, 391 F.3d, at 570. After all, once plans have complied with ERISA's statutory requirements, Congress has generally left it "to plan sponsors—not courts—'to adopt, modify, or terminate welfare plans.'" *Ibid.* (quoting *Schoonejongen*, 514 U.S., at 78).

CONCLUSION

For these reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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Supreme Court of the United States

JOEL SEREBOFF and MARLENE SEREBOFF,

Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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REPLY BRIEF FOR THE PETITIONERS

Reduced to its essence, the position of MAMSI and its *amici* is that *Great West* should be overruled or limited. This subtle request by MAMSI and its *amici* proceeds in four parts.

First, MAMSI and its *amici* attempt to recast MAMSI's request for contract damages as a claim rooted in principles of equitable subrogation. As explained in Section I, however, MAMSI has sought contractual reimbursement in this case precisely to *avoid* the equitable principles that historically were used to govern subrogation claims. *See, infra*, pages 2-6.

Second, MAMSI and its *amici* argue that MAMSI is entitled to equitable restitution in the form of a constructive trust or an equitable lien to enforce its contractual reimbursement provision. As explained in Section II.A., however, MAMSI cannot contractually disclaim the very equitable principles that governed subrogation and then rely on the special tracing rules that were permitted by courts of equity in such cases. In making its case for equitable restitution, MAMSI and its *amici* also cite a handful of equitable lien cases. As explained in Section II.A., however, these equitable lien cases do not proceed on a theory of *restitution*. As such, they cannot be used by MAMSI to evade the requirement of tracing which was a precondition for all *restitution* claims in equity. Just as with a constructive trust, an equitable lien *based upon a theory of restitution* (*i.e.*, unjust enrichment) requires that a plaintiff trace the subject of the trust or lien back to property that was taken by the defendant from the plaintiff. This MAMSI cannot do. *See, infra*, pages 7-10.

Although never explicitly acknowledged by MAMSI or its *amici*, what MAMSI now seeks is an equitable lien *by agreement/assignment*. As explained in Section II.B.,

however, such liens were only available in equity if a plaintiff could meet an extremely strict standard. It is hornbook law that the mere promise—written or otherwise—to repay money out of a fund could never warrant this equitable remedy. To the contrary, a plaintiff had to establish that the defendant (at the time of contract) intended to relinquish control and appropriate the funds in question as security for payment of the debt. Of course, the mere acceptance of medical benefits subject to a boilerplate reimbursement provision could never satisfy such a requirement. *See, infra,* pages 11-13

Finally, MAMSI and its *amici* argue at length that various policy considerations compel the conclusion that section 502(a)(3) was intended to authorize MAMSI's claim. As explained in Section III, however, there is absolutely no legislative history or language in ERISA to support such a position. *See, infra,* pages 13-17. Moreover, as explained in Section IV, the misguided policy arguments advanced by MAMSI and its *amici* are nothing more than an attempt to overrule or limit the holding of *Great West.* This Court should decline any such invitation. Judicial modification of section 502(a)(3) based on controversial considerations of policy and purpose is particularly inappropriate given that the precise question presented by this case is currently being considered by Congress. *See, infra,* pages 17-19.

I. MAMSI HAS ASSERTED A LEGAL CLAIM FOR BREACH OF CONTRACT DAMAGES.

In its brief, MAMSI suggests that the source of its claim against the Sereboffs is the equitable doctrine of subrogation. Resp. Br. 12 ("Because the plan's position is directly analogous to that of an indemnity insurer in the subrogation context, the plan's claim, too is grounded in

equity.").[1] As explained below, this suggestion is completely unfounded.

A. MAMSI Sought Reimbursement to *Avoid* Equitable Principles of Subrogation.

The claims asserted by MAMSI in this lawsuit are predicated entirely upon a plan provision calling for reimbursement out of recoveries from third parties. Despite this obvious fact, MAMSI boldly proclaims that the "semantic distinction [between contractual reimbursement and subrogation] do[es] not in the least affect the equitable nature of the substantive remedies that the plan claims," Resp. Br. 16, because "reimbursement is 'encompassed within the concept of subrogation.'"). Resp. Br. 17 n.7 (quoting *Cont'l W. Ins. Co. v. Swartzendruber*, 570 N.W. 2d 708, 712 (Neb. 1997)). In order to appreciate the error of this reasoning, one need look no further than the very case MAMSI cites:

> Under principles of equity, an insurer is entitled to subrogation only when the insured has received, or would receive, a double payment. . . ."[A]llowing an insurer to subrogate against an insured's settlement when an insured has not been fully compensated would mean that all the insured's settlement could be applied to a medical payment subrogation claim with nothing left to compensate the insured for excess medical bills or personal injuries.". . . [E]quity requires that the insured be fully compensated before the insurer would be

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[1] The United States does not take the position that MAMSI's claim is based on principles of equitable subrogation. Nonetheless, the Solicitor General relies—almost exclusively—on a series of equitable subrogation cases in an effort to maintain that MAMSI satisfies the tracing requirements required for imposition of a constructive trust or an equitable lien on the settlement funds at issue. U.S. Br. 15-19.

> allowed to seek reimbursement from settlement proceeds. . . .

Id. (citations omitted).

MAMSI itself notes that "[t]he right of subrogation is not founded on contract. *It is a creature of equity*; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties." Resp. Br. 19 n.11 (emphasis in original). At the same time, however, MAMSI has consistently taken the position that ***only the contract terms*** are relevant in determining whether—and to what extent—MAMSI is entitled to reimbursement. In the words of the Solicitor General:

> The theory of respondent's action under Section 502(a)(3) is that $74,869.37 of petitioners' recovery from third parties belongs in good conscience to the plan, ***because petitioners were obligated by the plan's terms to reimburse the plan from the recovery.***

U.S. Br. 28 n.13 (bold emphasis added).

B. The District Court Granted Summary Judgment on the Contract and Refused to Consider Any Equitable Factors.

"[W]hile '[a] right of true [equitable] subrogation may be provided for in a contract . . . the exercise of the right will . . . have its basis in general principles of equity rather than in the contract, which will be treated as being merely a declaration of principles of law already existing.'" *Wasko v. Manella*, 269 Conn. 527, 849 A.2d 777 (Conn. 2004)

(quoting 83 C.J.S. Subrogation 3(b) (1953) (footnote omitted)).[2]

If the object of this lawsuit was truly equitable relief grounded in principles of subrogation, the district court would have considered equitable factors such as (1) whether (and to what extent) the tort settlement constituted a double payment;[3] (2) whether (and to what extent) the tort settlement left the Sereboffs under-compensated for their injuries;[4] and (3) whether (and to what extent)

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[2] This Court need not determine whether § 502(a)(3) permits a plan fiduciary to seek a constructive trust or equitable lien on monies obtained by a beneficiary who has allegedly impaired the plan's equitable subrogation rights. MAMSI has not pursued such a theory. Petitioners acknowledge that such a case would present a closer question. Although such relief might constitute "equitable restitution," it would likely not serve to "redress [] violations [or] enforce. . . ***the terms of the plan***." 29 U.S.C. § 1132(a)(3)(B) (emphasis added). In any event, if the Court determines that MAMSI can pursue such a claim, remand is required to address the issue of impairment and other equitable factors that were never considered.

[3] *See, e.g. Sutton v. Jondahl*, 532 P.2d 478, (Okla. App. 1975) (denying a landlord's insurer the right of equitable subrogation and noting that "[t]he principle of subrogation was begotten of a union between equity and her beloved—the natural justice of placing a burden of bearing a loss where it *ought to be*. Being so sired this child of justice is without the form of rigid rule of law. On the contrary it is a fluid concept depending on the particular facts and circumstances of a given case for its applicability. To some facts subrogation will adhere—to others it will not.") *Id.* at 481-82.

[4] *See, e.g., Wimberly v. American Casualty Company*, 584 S.W.2d 200 (Tenn. 1979) (denying conventional subrogation to insurers that had paid $15,000 to insured because insured's total loss was $44,619 and total recovery from the tortfeasor was only $25,000); *Frost v. Porter Leasing Corp.*, 436 N.E. 2d 387, 390 (Mass. 1982) (denying equitable subrogation and noting that "when subrogation is based on broad principles of equity and efficiency, rather than on the contract of the parties, isolation of medical expenses is artificial, and the accident victim's position should be viewed a whole.").

MAMSI's lack of participation in the settlement should eliminate or reduce its right to recover from the Sereboffs.[5]

To be clear: Petitioners raised these arguments with both the district court[6] and court of appeals.[7] Although these claims were never controverted by MAMSI, the district court considered them immaterial "because the plain language of the plan indisputably requires reimbursement under the circumstances." Pet. App. 31a. Similarly, the Fourth Circuit concluded that "the disputed funds belong in good conscience to MAMSI [merely because t]he Plan contains express, unambiguous reimbursement provisions, according MAMSI the 'right to recover ***any*** payments' made to the Sereboffs by a third party." Pet. App. at 11a (emphasis added).[8]

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[5] "[W]hen the plaintiff asserts an equitable remedy, equitable defenses can be invoked even if they could not be invoked against a 'legal' claim." 1 D. Dobbs, *Law of Remedies*, § 2.1(3), at 66 (2d ed. 1993).

[6] *See, e.g.*, Defendants' Reply to Plaintiff's Response to Defendants' Motion to Dismiss and to Defendants' Response to Plaintiff's Motion for Summary Judgment at 4 (noting that "the Sereboffs never attempted to recover medical payments as part of their recovery. . . . . Counsel specifically told MAMSI that they should negotiate separately for the reimbursement of any monies due and owing MAMSI. . . . There is no double recovery under the circumstances of this case.")

[7] *See, e.g.*, Appellants' Brief 10-11 (arguing that "if the relief sought by MAMSI is an 'equitable remedy,' it would require . . . a District Court Judge to hold an evidentiary hearing and determine the equities involved in the reimbursement if it is to take place. . . . Only then could a court make a determination that in 'good conscience' the plaintiff was to be deprived of his/her personal injury damages.").

[8] The district court's failure to consider any equitable factors constitutes conclusive evidence that it viewed MAMSI's action as requesting relief for contract breach and *not* for the violation of any *equitable* subrogation rights. Of course, this is only a threshold

II. THE EQUITABLE REMEDIES OF CONSTRUCTIVE TRUST AND EQUITABLE LIEN ARE NOT AVAILABLE TO MAMSI.

A. MAMSI Cannot Meet the Tracing Requirements for Equitable Restitution.

As explained by this Court in *Great West*, equitable restitution and legal restitution are distinct doctrines. *See Great West*, 534 U.S. at 212-13 ("'[R]estitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case,' and whether it is legal or equitable depends on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought.") While they share the same justification (*i.e.*, a desire to avoid unjust enrichment), they result in different forms of relief. A plaintiff seeking legal restitution could obtain a personal judgment whereas a plaintiff seeking equitable restitution would obtain the right to specific property (a constructive trust) or a security interest in specific property (an equitable lien).

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question. The second question—which is addressed in Section II, *infra*—is whether or not the relief that MAMSI sought for this contract breach (*i.e.*, a constructive trust or equitable lien) was typically available in equity. If this Court ultimately decides that MAMSI has sought relief that was typically available in equity, Petitioners have argued that such relief is not "appropriate" because, *inter alia*, the MAMSI plan disclaimed the "make-whole" doctrine and provided for first dollar recovery. Pet. Br. 30-35. According to MAMSI, this second argument is "not properly before the Court because, even if the argument could be made to apply, it addresses only the amount of the recovery, not whether a court could grant a recovery at all." Resp. Br. 31. MAMSI is wrong. If "appropriate equitable relief" for the violation of a plan provision requires a federal court to consider factors other than the text of the plan, Petitioners are entitled to remand. The fact that MAMSI would still be entitled to bring its action does not take this argument out of the scope of the question presented. It merely means that Petitioners would not be entitled to a complete reversal.

1. The constructive trust and equitable lien were developed by equity courts to permit restitution of traceable property that was taken from the plaintiff.

During times of the divided bench, a plaintiff could seek *equitable* restitution when a personal judgment was undesirable. Customarily, this occurred either when: (1) the defendant was insolvent or (2) the property had been transferred to a third party. In the first of these situations (*i.e.*, an insolvent defendant), a personal judgment was undesirable because the plaintiff would likely be unable to collect the full amount. *See* 1 Dobbs, at 157 ("The constructive trust has great advantages, one of which is to permit the plaintiff to recover the fund without sharing it with any other creditors, because in the eyes of equity it is his."). In the second of these situations (*i.e.*, transferred property), a personal judgment against the defendant was often undesirable because the plaintiff desired return of the specific property. This could only be accomplished through an equitable remedy.[9]

Because equitable restitution permitted a plaintiff to recover specific property both (i) prior to other creditors and (ii) from third parties, strict tracing rules developed so as to justify the powerful preference that the plaintiff was requesting. "Indeed, a major reason for the rules requiring tracing is to avoid the unfairness that results to creditors of the defendant and other innocent persons when a preference is invoked without justification." 1 Dobbs, at 593.

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[9] Even if the plaintiff merely wanted monetary compensation for the property that had been transferred to the third party, a personal judgment against the defendant would be unsatisfactory if the defendant were insolvent or merely judgment-proof. In such a case, equitable relief was required so that the plaintiff could recover from the third party.

2. The money in Petitioners' investment account cannot be traced to MAMSI.

As explained in Petitioners' opening brief:

> MAMSI's claim is not for return of particular money that the Plan paid to the Sereboffs and that the Sereboffs still retain. . . . [A]ny money that the Plan paid on behalf of the Sereboffs has already been spent on legitimate medical expenses. What MAMSI is seeking, therefore, is not the return of Plan money or profits from its use or exchange. Rather, MAMSI is seeking to recover new money paid out by third parties, the alleged tortfeasors.

Pet. Br. 20.

MAMSI and its *amici* do not dispute this characterization of MAMSI's claim. Nor could they. Instead, they argue that "[n]o rule of equity requires the plan to show that its payments of benefits can be traced through petitioners' tort recovery from a third party and into petitioners' investment accounts." U.S. Br. 16. Unsurprisingly, neither MAMSI nor its *amici* cite *a single case* in which a constructive trust or equitable lien was imposed as *restitution* for a breach of contract.[10] Instead, they cite authorities that fall into two distinct areas, neither or which has any relevance to whether equitable restitution is available in this case.

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[10] As Petitioners expressly conceded in their opening brief, a constructive trust or an equitable lien may be granted in simple breach of contract cases in limited areas. Pet. Br. 9 n.4. These rare situations, however, all involve property that can be traced back to the plaintiff. *See e.g., Matthews v. Crowder*, 111 Tenn. 737 (1902); *Clark v. McCleery*, 115 Iowa 3 (1901).

First, they cite a litany of equitable subrogation cases[11] for the proposition that a "full-circle theory of tracing, if adopted in the subrogation context, would instantaneously destroy the entire doctrine of equitable subrogation because, by definition, the recovery from the third-party wrongdoer is never the same *res* of funds used to satisfy the claim." Resp. Br. 27.

These authorities provides no support for MAMSI because they are directed at a straw man. Petitioners do not contend—and have never suggested—that "full circle" tracing is required in the equitable subrogation context. As explained above, MAMSI's claim is one for contractual reimbursement, not equitable subrogation. Professor Laycock, one of the experts on restitution relied on by MAMSI, provides an excellent explanation regarding why equitable subrogation had a different set of tracing rules from other claims of equitable restitution:

> Subrogation may be thought of as a tracing remedy [where a]n identifiable asset—typically a claim or lien against an alleged wrongdoer or common debtor—is transferred to plaintiff. But subrogation differs from more conventional tracing claims in

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[11] *Blaauwpot v. Da Costa*, 1 Eden 130, 28 Eng. Rep. 633 (Ch. 1758) (Resp. Br. 14, 16, 17, 27); *Comegys v. Vasse*, 1 Pet. 193 (1828) (Resp. Br. 13, 16, 27; U.S. Br. 14); *Gracie v. New-York Ins. Co.*, 8 Johns. 237 (NY 1811) (Resp. Br. 13, 14, 16, 17); *Hall & Long v. Railroad Cos.*, 80 U.S. (13 Wall.) 367 (1871) (U.S. Br. 12); *Leonard v. Nye*, 125 Mass. 455 (Mass. 1878) (Resp. Br. 14); *Monmouth County Mut. Fire Ins. Co v. Hutchinson*, 21 N.J. Eq. 107 (N.J. Ch. 1870) (Resp. Br. 14, 17, 20) (U.S. Br. 13); *Newcomb v. Cincinnati Ins. Co.*, 22 Ohio St. 382 (Ohio 1872) (Resp. Br. 17); *Randal v. Cockran*, 1 Ves. Sen 98, 27 Eng. Rep. 916 (Ch. 1748) (Resp. Br. 13, 20) (Subrogation Professionals Br. 10, 11). *See also* 4 G. Palmer, Law of Restitution, 23.18(d), at 470 (Resp. Br. 15); 2 W. Phillips, Treatise on the Law of Insurance 1723, at 397 (5th ed. 1867) (Resp. Br. 14); 8 G. Couch, Cyclopedia of Insurance Law 2002, at 6606 (1931) (Resp. Br. 14).

> that the asset acquired by subrogation was not in any sense taken from the plaintiff.

D. Laycock, *Modern American Remedies* (1st Ed. 1985), at 574 (emphasis added).

Second, MAMSI and its *amici* collectively cite five equitable lien cases.[12] *See, e.g.*, Resp. Br. 28 ("Nor has petitioners' cramped interpretation of traceability ever been the rule in other, similar contexts. In *Barnes v. Alexander*, the fund received from the third-party defendant obviously did not find its source in the attorney's own bank account.") (citation omitted); U.S. Br. 16, 17 ("This Court's decision in *Barnes* illustrates [that t]he plan does not have to trace the funds petitioners received in settlement back to the funds the plan paid for medical expenses.").

Again, these authorities are directed at a straw man. Petitioners do not contend—and have never suggested—that any tracing was historically required when an equitable lien was imposed *by agreement*. Petitioners' argument is merely that an equitable lien—when predicated on a theory of *equitable restitution*—requires tracing.

B. The Boilerplate Reimbursement in the MAMSI Plan Is Insufficient to Constitute an Equitable Lien by Assignment.

Equitable restitution was the only theory advanced by MAMSI and relied upon by the lower courts. Equitable assignment is a new theory advanced by MAMSI and the United States in this Court to justify the imposition of an

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[12] *Barnes v. Alexander*, 232 U.S. 117 (1914) ("*Barnes*") (Resp. Br. 23, 24, 25, 28; U.S. Br. 11, 16, 21, 23; Central States Br. 20); *Walker v. Brown*, 165 U.S. 654 (1897) ("*Walker*") (U.S. Br. 11, 23); *Wylie v. Coxe*, 56 U.S. 415 (1853) ("*Wylie*") (Central States Br. 20, 21); *Peugh v. Porter*, 112 U.S. 737 (1885); and *Fourth St. Nat'l Bank v. Yardley*, 165 U.S. 634 (1897).

equitable lien. As with equitable restitution, however, reliance on the theory of equitable assignment is unavailing. MAMSI and its *amici* present absolutely no evidence to the contrary.

1. An equitable lien by assignment required more than a contract to pay out of a specific fund.

At equity, it was hornbook law that, "[a] covenant by a debtor to pay certain debts out of a particular fund, when the same should be received, is merely a personal covenant." Leonard A. Jones, *A Treatise on the Law of Liens: Common Law, Statutory, Equitable and* Maritime, § 48, at 34 (1914) (citing *Rogers v. Hosack*, 18 Wend. 319). According to this Court:

> [A] mere agreement to pay out of such fund is not sufficient. Something more is necessary. ***There must be an appropriation of the fund*** *pro tanto*. . . . For a breach of the agreement, the remedy was at law, not in equity.

Trist v. Child, 88 U.S. 441, 446 (1874); *see also Gibson v. Stone*, 28 How. Pr. 468, 43 Barb. 285 (N.Y. 1865) ("All that [defendants] have said in the letters . . . amounts [] to a promise to hold the goods in trust for the benefit of the plaintiffs, and to pay the proceeds to them, giving to the plaintiffs no equitable assignment."); *Wright v. Ellison*, 68 U.S. 16 (1863); *Christmas v. Russell*, 81 U.S. 69 (1871); *Dillon v. Barnard*, 88 U.S. 430 (1874); *Williams v. Ingersoll*, 89 N.Y. 508 (Ct. App. NY 1882); *Morton v. Naylor*, 1 Hill 583 (NY 1841); *Hauselt v. Vilmar*, 2 Abb. N. Cas. 222 (NY 1877).

2. The plan's reimbursement provision is nothing more than a contract to pay a debt out of a specific fund.

The boilerplate plan language in this case cannot satisfy the strict appropriation requirements required in order to constitute an equitable lien by assignment. Petitioners did not relinquish their interest in the settlement funds such that the debt was directed to the fund nor did they demonstrate any intent to relinquish their interest and allow an equitable lien to attach. By accepting benefits under the plan, Petitioners merely agreed to use that fund, if it came into existence, to reimburse MAMSI. Such an agreement is personal.

The five cases cited by MAMSI are distinguishable. In particular, three of those cases involve equitable liens asserted by attorneys on recoveries that they obtained on behalf of clients who personally agreed to pay a specific percentage of any recovery.[13] These cases have long been recognized as falling within one of two narrow areas in which the typical rules regarding equitable liens by assignment were relaxed. *See, e.g., B. Kuppenheimer & Co. v. Mornin*, 78 F.2d 261, 264 (CA 8 1935) (specifically citing two of these contingency fee cases as examples of a "mellowing [of the general rules because] there are fairly good reasons for putting aside the strict requirements of the doctrine of equitable assignments [] in the case of an asserted lien by a lawyer for his fee [] for the efforts of the lawyer bring the fund into existence"); *Lone Star Cement Corp. v. Swartwout*, 93 F.2d 767, 771 (CA 4 1938) (same); *Jamison Coal & Coke Co. v. Goltra*, 143 F.2d 889, 893 (CA 9 1944) (same).

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[13] These three cases are *Barnes*, *Walker*, and *Wylie*.

III. THIS COURT SHOULD DECLINE THE INVITATION TO RESOLVE DOUBTS ABOUT REIMBURSEMENT IN FAVOR OF PERMITTING SUIT UNDER 502(a)(3).

According to the United States, "this Court should resolve any doubts about the scope of 'equitable relief' under section 502(a)(3) in favor of its availability to enforce valid plan terms. U.S. Br. 23 (arguing that Congress "surely incorporated the kind of flexibility in equitably remedying injustice that characterized the equitable side of the bench.").[14] For the reasons that follow, the presumption urged by the Solicitor General should be rejected.

A. For Good Reason, Congress Limited the Ability of Plan Fiduciaries to Seek Monetary Relief for Breach of Plan Terms.

Section 502(a)(1) of ERISA permits a plan beneficiary or participant "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1). Unlike section 502(a)(3), section 502(a)(1) does not limit the authorized remedies to "equitable" relief.[15]

There is good reason for this limitation. As the United States observes, "ERISA itself 'does not regulate the

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[14] By "valid," the Solicitor General appears to refer to any term that is not expressly prohibited by ERISA itself. As such, this argument appears to read the modifier "appropriate" completely out of the statute.

[15] Notably, section 502(g) of ERISA authorizes fiduciaries to obtain unpaid contributions, interest, and liquidated damages for certain plan violations by an employer. *See* 29 U.S.C. 1132(g) (also authorizing "such other ***legal*** or equitable relief as the court deems appropriate") (emphasis added).

substantive content of welfare-benefit plans," U.S. Br. 25 (citing *Inter-Modal Rail Employees Ass'n v. Santa Fe Ry.*, 520 U.S. 510, 515 (1997)). Consequently, ERISA plans and the United States have consistently argued that any valid plan term must trump equitable principles. *See, e.g.*, Brief of the Department of Labor in *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer Poirot & Wansbrough,P.C.*, http://www.dol.gov/sol/media/briefs/bombardier-9-11-03.htm (last accessed on March 21, 2006) ("If the terms of the plan expressly provide for full reimbursement from third-party recoveries and disclaim responsibility for attorney fees and costs incurred in the pursuit of those recoveries, the terms of the plan should override any "common fund" doctrine that may otherwise be available at state or federal common law.") (citation omitted).[16] The limitation of available relief in section 502(a)(3) to those types that are both "equitable" and "appropriate" serves as an essential judicial check.

B. There Is No Evidence That Congress Intended Plan Reimbursement Provisions to Be Enforceable Under ERISA.

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[16] "ERISA plans and their insurers [] pursue a rule of absoluteness—they seek reimbursement without regard to the situation of the plan member." Roger M. Baron, *Public Policy Considerations Warranting Denial of Reimbursement to ERISA Plans: It's Time to Recognize the Elephant in the Courtroom*, 55 Mercer Law Review 595, 623 (2004). *See, e.g., Mcintosh v. Pacific Holding Co.*, 992 F.2d 882, 885 (CA 8 1993), *cert denied*, 510 U.S. 965 (1993) (permanently disabled plan member required to pay entire $250,000 personal injury recovery to ERISA plan as reimbursement for payment of medical bills); Michelle Andrews, "Adding Insult to Injury," Smart Money Magazine, July 2000, at 130 (providing additional examples).

Despite the conspicuous absence of any mention of subrogation[17] or reimbursement[18] in ERISA, MAMSI and its *amici* intimate that Congress could not possibly have intended that section 502(a)(3) fail to provide a remedy for the clear violation of a plan reimbursement clause. Of course, neither MAMSI nor its *amici* point to *any* evidence that Congress intended the phrase "other appropriate equitable relief" to authorize breach of contract lawsuits for reimbursement.

"Congress enacted ERISA against the background of a long common law history that prohibited subrogation actions by an insurer to recover medical expenses." ATLA Br. 12; *see also* Pet. Br. 28 n.15. At present, some states (either by statute or common law) continue to *categorically* prohibit reimbursement of advanced medical expenses.[19] Moreover, "the overwhelming majority of states that [do] allow reimbursement have adopted the made-whole doctrine." ATLA Br. 28 (citing Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped in*

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[17] "ERISA says nothing about subrogation provisions. ERISA neither requires a welfare plan to contain a subrogation clause nor does it bar such clauses or otherwise regulate their content." *Member Servs. Life Ins. Co. v. Am. Nat'l. Band & Trust Co.*, 130 F.3d 950, 958 (10th Cir. 1997) (*quoting Ryan v. Fed. Express Corp.*, 78 F.3d 123, 127 (3d Cir. 1996)).

[18] "Congress in providing civil enforcement remedies for plan fiduciaries under ERISA, made no provision for [] reimbursement, as it has in other statutes." ATLA Br. 11 (comparing ERISA to 42 U.S.C. §§ 2651-2653 and 42 U.S.C. § 1395y). *See also* Pet Br. 32 n.17.

[19] *See e.g., Kan. Admin. Regs.* 40-1-20 ("An insurance company shall not issue contracts of insurance in Kansas containing a 'subrogation' clause applicable to coverages providing for reimbursement of medical, surgical, hospital or funeral expenses."); *Allstate Ins. Co. v. Reitler*, 628 P.2d 667, 670 (Mont 1981) (reimbursement of medical payments void as matter of public policy); *Maxwell v. Allstate Ins. Cos.*, 728 P.2d 812, 815 (Nev. 1986) (same).

the Mystery of Insurance Subrogation, 70 Mo. L. Rev. 723 (2005)).

In sum, the limitations placed by Congress on the ability of fiduciaries to seek legal relief to enforce plan terms coupled with the omission of any reference to reimbursement in the text or legislative history of ERISA counsel against a presumption that Congress intended to endow plan fiduciaries with unbridled discretion to write reimbursement provisions and then seek contract damages for their breach.

IV. THE MISGUIDED POLICY ARGUMENTS ADVANCED BY MAMSI AND ITS AMICI SHOULD BE ADDRESSED TO CONGRESS.

Although MAMSI pays lip service to the notion that policy arguments regarding the propriety of reimbursement must be directed to Congress,[20] the thrust of the opposition to Petitioners' position is grounded in notions of policy.[21]

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[20] "[I]n the final analysis, it is important that policy arguments 'be directed to [a plan's] trustees, or to Congress, rather than to the federal courts.'" Resp. Br. 33-34 (citing *Kress*, 391 F.3d, at 570). At this very time, Congress is considering the controversial policy issue presented by this case. ATLA at 14 (discussing the Pension Protection Act of 2005, H.R. 2830, 109th Cong., 307 (2005)).

[21] For example, MAMSI and its *amici* go to great lengths to argue that Petitioners' interpretation of "appropriate equitable relief" would leave ERISA plans without an adequate way to obtain legitimate reimbursements. Of course, Petitioners disagree with this contention. Nonetheless, the answer is largely academic because the mere absence of an adequate alternative remedy cannot convert a legal claim into an equitable one. Under settled law, ERISA plan beneficiaries often lack a remedy when plan terms are violated by fiduciaries. If Congress wishes to provide a legal remedy for certain plan violations, it is free to do so.

In any event, the policy arguments advanced by MAMSI and its *amici* are misguided. In reality, permitting ERISA plans to enforce contractual reimbursement provisions is inconsistent with fundamental principles behind ERISA. Such a result would fail to protect beneficiaries and would substantially threaten to undermine Congress's deliberate decision in ERISA to leave the regulation of insurance to the states.

Permitting contractual reimbursement under ERISA is likely to substantially harm injured beneficiaries while creating limited, if any, savings for others. Most tort plaintiffs, particularly the seriously injured, do not receive full compensation in the tort system. Many of the reasons for this fact are set forth in the amicus brief filed by the Association of the Trial Lawyers of America. *See, e.g.*, ATLA Br. 16-17 (discussing the limits of tortfeasors liability insurance); *id.* (discussing the uncertainty and cost of litigation to verdict); *id.* at 21-22 (discussing state law restrictions on the collateral source rule); *id.* at 23 (discussing state law damages caps and state law limitations of liability based upon comparative fault). Put simply, conjectural claims regarding whether (and to what extent) reimbursement recoveries will reduce premiums and incrementally benefit other beneficiaries cannot overcome the undeniably harsh treatment of the majority of seriously injured beneficiaries. That position truly is insurance running in reverse.

Finally, permitting contractual reimbursement under section 502(a)(3) is also likely to seriously undermine state insurance regulation. As noted by the United States, "[s]tate laws limiting reimbursement may of course apply to insured ERISA plans if those state laws are directed to insurance." U.S. Br. 26 n.11 (citations omitted). By permitting self-funded plans—many of which purchase stop-loss coverage—to seek unrestricted contractual

reimbursement, MAMSI's interpretation of section 502(a)(3) permits insurance companies to use ERISA to contract around the ubiquitous state-law limitations on reimbursement. Particularly for these commercial insurers, the proposition that reimbursement recoveries will redound to the benefit of policyholders (in the form of reduced premiums) as opposed to increased dividends and/or executive compensation is far from obvious.[22]

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[22] For the year 2002, at least 1,924 insurance executives had compensation exceeding $600,000 per year, with more than 267 executives having annual compensation in excess of $1,500,000 and ninety-four executives with annual compensation exceeding $5,000,0000. 30 The Insurance Forum 229 (August 2003) *See also In Hot Pursuit of the Reimbursement Cases*, 5, 21 Barrister, issue No. 216, May/June 2004.

CONCLUSION

For the above reasons, Petitioners respectfully request this Court to reverse the judgment of the court of appeals.

DATE: March 2006

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v.

MID ATLANTIC MEDICAL SERVICES, INC.

ON WRIT OF CERTIORARI
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FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a civil action brought under Section 502(a)(3) of the Employee Retirement Income Security Act, 29 U.S.C. 1132(a)(3), to enforce a plan term requiring reimbursement of plan-paid medical expenses out of funds a participant recovers from a third party responsible for the underlying illness or injury, is an action for "appropriate equitable relief" authorized by that section, when reimbursement is sought through imposition of a constructive trust or an equitable lien on the proceeds of the third-party recovery that are traceable to a specific fund in the participant's possession.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The question presented in this case concerns the scope of "appropriate equitable relief" available in a civil action by a plan fiduciary under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(3). The Secretary of Labor has similar authority to bring a civil action for "appropriate equitable relief" under Section 502(a)(5) of ERISA, 29 U.S.C. 1132(a)(5). Accordingly, the Court's determination of what constitutes "appropriate equitable relief" may affect not only the scope of private civil actions under Section 502(a)(3), which are a necessary complement to actions by the Secretary, but also the scope of the Secretary's own authority under Section 502(a)(5).

STATEMENT

1. Petitioners Joel and Marlene Sereboff are members of a self-funded health insurance plan sponsored by Marlene Sereboff's employer, the Katzen Eye Group. Pet. App. 3a, 24a, 36a-37a. On June 22, 2000, petitioners were injured in an automobile accident. *Id.* at 3a-4a, 36a. The plan paid $74,869.37 for their medical expenses. *Id.* at 4a, 24a, 37a. Petitioners sued third parties responsible for the accident. *Id.* at 4a, 24a, 36a-37a.

Respondent Mid Atlantic Medical Services, Inc., as the plan's fiduciary, asserted reimbursement and lien rights against any recoveries from the third parties. Pet. App. 3a-5a, 36a, 39a-45a. Respondent also requested petitioners to cooperate with the enforcement of those rights and to sign lien documents. *Id.* at 4a-5a, 40a-44a. In so doing, respondent was acting pursuant to a plan provision requiring that, when a member is injured as a result of the act or omission of a third party and the plan pays benefits for that injury, the plan is subrogated to the member's right to recover damages from the third party. *Id.* at 4a, 38a. The plan provision states that

> [a]ll recoveries from a third party (whether by lawsuit, settlement, or otherwise) must be used to reimburse [respondent] net of reasonable attorney fees and court costs prorated to reflect that portion of the total recovery which is due [respondent] for benefits paid. * * * [Respondent's] share of the recovery will not be reduced because you * * * ha[ve] not received the full damages claimed, unless [respondent] agrees in writing to a reduction.

J.A. 75. The plan further requires members to "promptly advise [respondent]" of third-party claims and to execute any assignments, liens, or other documents the Company re-

quests. *Ibid.* The plan may withhold benefits until such documents are received. *Ibid.*

Petitioners declined to recognize respondent's asserted rights or sign the documents. Instead, they settled the third-party litigation for $750,000 and placed the proceeds into their investment accounts. Pet. App. 5a-6a, 44a-45a.

2. Following the settlement, respondent sued petitioners under Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3). That section authorizes a plan fiduciary to bring a civil action—

> (A) to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan.

29 U.S.C. 1132(a)(3). Respondent sought to enforce the plan's terms requiring reimbursement by, among other things, obtaining restitution of the funds held in petitioners' investment accounts. Pet. App. 6a. The parties stipulated to relevant facts, and respondent filed a motion for summary judgment. *Id.* at 6a, 25a, 36a-45a. Petitioners filed a motion to dismiss, asserting that respondent impermissibly sought monetary damages whereas ERISA permits only "appropriate equitable relief." *Id.* at 6a.

3. The district court granted summary judgment to respondent in relevant part. Pet. App. 24a-35a.[1] The court reasoned that, under *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002), respondent sought equitable

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[1] The district court reduced respondent's recovery by about 10% pursuant to the plan term allowing the plan to share the attorney's fees a participant incurs in obtaining a third-party recovery. Pet. App. 15a, 32a. Respondent does not dispute that reduction for attorney's fees. Whether respondent is entitled to attorney's fees under Section 502(g) of ERISA, 29 U.S.C. 1132(g), see Pet. App. 16a-18a, is also not at issue.

restitution that is available under Section 502(a)(3), rather than legal restitution, which is unavailable under that Section. Pet. App. 27a-32a. The court read *Great-West* to permit a plan fiduciary to sue for funds that are specifically identifiable, belong in good conscience to the plan, and are within the possession and control of the defendant beneficiary. *Id.* at 30a. Respondent sought specifically identifiable funds, the court explained, because it sought the very funds paid to petitioners by the third-party tortfeasors. *Id.* at 31a. The funds belonged in good conscience to the plan, the court concluded, because the plain language of the plan indisputably requires petitioners to reimburse the plan-paid medical expenses. *Ibid.* The funds were also in petitioners' possession and control, the court reasoned, because they had been placed in petitioners' investment accounts and segregated pending the result of this lawsuit. *Ibid.*; see *id.* at 6a (petitioners agreed "to 'preserve $74,869.37 of the settlement funds'") (quoting 03-2269 Order 1 (D. Md. Aug. 11, 2003)). Accordingly, the court ordered petitioners to reimburse respondent for its medical expenses. *Id.* at 34a-35a.

4. The court of appeals affirmed the district court's grant of summary judgment and the reimbursement award. Pet. App. 1a-19a. Like the district court, the court of appeals read *Great-West* to permit a plan fiduciary to sue under Section 502(a)(3) for funds that are specifically identifiable, belong in good conscience to the plan, and are within the possession and control of the defendant beneficiary. *Id.* at 10a-11a. For essentially the same reasons as the district court, the court of appeals concluded that respondent's action satisfied those conditions. See *id.* at 11a-12a. Accordingly, the court held that respondent's action was one for "appropriate equitable relief" under 29 U.S.C. 1132(a). Pet. App. 12a.

SUMMARY OF ARGUMENT

A. Respondent's reimbursement action seeks "appropriate equitable relief" authorized by Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3). Under the framework established by *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002), a court must determine whether "the relief sought by the plaintiff" is relief that would have typically been available in a court of equity. Applying that rule, the Court in *Great-West* stated that a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or equitable lien, if money or property identified as belonging in good conscience to the plaintiff could be traced to particular funds or property in the defendant's possession. In *Great-West*, the Court held that the reimbursement action did not seek "equitable" relief, because it merely sought to impose personal liability on the defendant for an amount of money owed to the plaintiff.

B. Respondent's action here satisfies *Great-West*'s conditions for "equitable relief". First, respondent seeks to recover specifically identifiable funds—petitioners' settlement proceeds—unlike the fiduciary in *Great-West*, who sought only to impose personal liability on a plan participant for a contractual obligation to pay money. Second, the funds belong in good conscience to the plan because the plan's terms require that recoveries from third parties "must be used to reimburse" respondent for the medical benefits it provided. J.A. 75. Third, and finally, the proceeds of the settlement are clearly traceable to petitioners' investment accounts. The plan's terms thus created an equitable lien that was typically enforceable in equity under principles recognized by this Court and confirmed by a majority of state courts.

C. Petitioners' arguments that the relief is not "equitable" are unpersuasive. There is no requirement in equity for

the plaintiff to trace the money in petitioners' investment accounts back to the funds used by the plan to pay medical expenses; the plaintiff in equity had only to trace the funds to particular funds (here, a portion of the settlement proceeds) that in good conscience belong to the plaintiff and that therefore are subject to the constructive trust or equitable lien the plaintiff seeks to enforce. There is also no requirement that the plan lack an adequate remedy at law to enforce its equitable right to the settlement proceeds and, in any event, the plan lacks an adequate legal remedy.

D. Although traditional principles of equity firmly establish that respondent seeks "appropriate equitable relief" in this case, any remaining doubt on that score should be resolved in favor of enforcement of the plan's terms. Because the Section 502(a)(3) inquiry under *Great-West* turns on the relief traditionally available in equity in analogous cases, courts may face cases in which there is uncertainty, or divergent views among courts and commentators, about the authority of equity courts or the precise line dividing law and equity. In such cases, courts should exercise caution in relying on one, rather than another, case or line of authority to foreclose relief under Section 502(a)(3). Instead, in light of Congress's appeal to equity in Section 502(a)(3) and equity's historic role in providing complete relief to further statutory purposes, courts should resolve doubts in favor of ERISA's core policy to provide effective enforcement of lawful plan terms that comply with ERISA. Congress chose to leave it largely to plan sponsors to provide benefits and impose plan conditions in accordance with their own circumstances and best judgment, so that they would be encouraged to form ERISA plans and provide benefits to employees. Restrictions on the enforceability of lawful and valid plan terms disserve that purpose, as this case would amply demonstrate if petitioner's argument is accepted. Doubtful questions about the

scope of "equitable relief" in Section 502(a)(3) should accordingly be resolved in favor of enforcement of lawful plan terms—in this case, the plan's reimbursement provision.

E. Petitioners' contention that reimbursement actions are not "appropriate" equitable relief is mistaken. Such actions are fair to the particular parties from whom reimbursement is sought, because those parties receive precisely what they were promised: immediate payment of medical benefits by the plan subject to a requirement to reimburse the plan from a later recovery. Such actions also preserve plan assets for the benefit of all members generally, and reasonably preclude participants and beneficiaries from inequitable and wasteful conduct in obtaining windfall recoveries in the event of an accident—once from the plan and then again in a third-party tort recovery of those same costs.

The Court need not consider petitioners' arguments about the "make whole" doctrine, under which an insurer cannot recover its payments of an insured's medical expenses from an insured's third-party recovery until the insured is "made whole" for his or her injuries. Petitioners failed to raise that issue in the court of appeals or in the certiorari petition, and they failed to establish as a factual matter that their $750,000 tort recovery is less than the amount necessary to make them whole. This case therefore properly presents only the more basic question whether a plan may ever bring a Section 502(a)(3) action to enforce a valid reimbursement provision.

In any event, because there is nothing in ERISA itself that imposes limitations on plan terms with respect to this issue, the terms of the plan should control. Here, the terms of the plan are clear that the plan is entitled to recover the entire amount of the medical expenses it paid (less its proportional share of attorney's fees), and the $750,000 recovery from the third party greatly exceeds the plan's $74,869.37 claim for recovery.

ARGUMENT

SECTION 502(a)(3) AUTHORIZES AN ACTION TO ENFORCE PLAN TERMS REQUIRING REIMBURSEMENT OF PLAN-PAID MEDICAL EXPENSES OUT OF FUNDS A PARTICIPANT RECOVERS FROM A THIRD PARTY RESPONSIBLE FOR THE UNDERLYING ILLNESS OR INJURY

Section 502(a)(3) of ERISA authorizes a participant, beneficiary, or fiduciary to bring a civil action—

> (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. 1132(a)(3). There is no dispute that respondent is a fiduciary and that the plan's terms require petitioners to use their $750,000 third-party tort recovery to reimburse respondent for $74,869.37 in plan-paid medical expenses, reduced by a proportionate share of the attorney's fees petitioners incurred in their third-party litigation. There is also no dispute that petitioners failed to reimburse respondent or to sign the lien documents that the plan required them to sign. See J.A. 75. The sole issue is whether respondent may maintain this action at all as one for "appropriate equitable relief" authorized by Section 502(a)(3) to redress petitioners' violations of the plan or to enforce the terms of the plan.

A. Under *Great-West*, An Action For Equitable Restitution Is An Action For "Equitable Relief" Authorized By Section 502(a)(3)

This Court has construed "equitable relief" under Section 502(a)(3) to mean "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens* v.

Hewitt Assocs., 508 U.S. 248, 256 (1993).[2] The Court has further explained that claims for "restitution" may be either legal or equitable, depending "on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought." *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 213 (2002) (alteration in original).

In *Great-West*, this Court explained that "a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." 534 U.S. at 213 (discussing 1 Dan B. Dobbs, *Law of Remedies* § 4.3(1), at 587-588 (2d ed. 1993) (Dobbs); Restatement of Restitution § 160 cmt. a at 641-642 (1937), and 1 George E. Palmer, *Law of Restitution* (1978) § 1.4, at 17, § 3.7, at 262 (1978) (Palmer)). In those circumstances, a court of equity could "order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner." *Great-West*, 534 U.S. at 213; see also Restatement of Restitution § 161 cmt. b at 651 (where an equitable lien is on a fund, "it is enforced by a direction to pay the claimant out of the fund"). Where those circumstances are not present—*i.e.*, where the claim is that plaintiffs merely are "entitled to *some* funds for benefits that they conferred"—the suit seeks the legal remedy of "the imposition of personal liability for the benefits that [plaintiffs] conferred upon [defendant]." *Great-West*, 534 U.S. at 214.

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[2] It has been argued that mandamus was historically a legal, not equitable remedy. John H. Langbein, *What ERISA Means by "Equitable": the Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 Colum. L. Rev. 1317, 1353-1354 (2003). None of this Court's ERISA cases have turned on the proper classification of mandamus.

Under that analysis, Section 502(a)(3) permits a plan fiduciary to bring an action for equitable restitution where (1) the fiduciary seeks specific money or property, (2) the money or property belongs in good conscience to the plan, and (3) the money or property can clearly be traced to money or property in the defendant's possession. See Pet. App. 10a-13a. If those conditions are satisfied, the court can award the fiduciary title to the money or property at issue or a security interest in it, and require that the money or property be transferred to the fiduciary. See *Great-West*, 534 U.S. at 213-214; Restatement of Restitution § 161 cmt. b at 651.

In *Great-West* itself, the Court determined that the conditions for equitable restitution were not satisfied and that Section 502(a)(3) therefore did not permit the action for reimbursement at issue there. The plan terms in that case gave the plan (1) a first lien on any recovery from a third party, and (2) also provided that, "[i]f the beneficiary recovers from a third party and fails to reimburse the Plan, 'then he will be personally liable to [the Plan] . . . up to the amount of the first lien.'" 534 U.S. at 207 (citation omitted). In *Great-West*, the fiduciary attempted to enforce the plan terms by suing for a money judgment to recover settlement funds *after* the settlement proceeds had been distributed and were "not in [the beneficiaries'] possession." *Id.* at 214; see *id.* at 208-209. In those circumstances, the Court held that the fiduciary sought, "in essence, to impose personal liability on [the beneficiaries] for a contractual obligation to pay money—relief that was not typically available in equity." *Id.* at 210; see *id.* at 213 (quoting 1 Dobbs § 4.2(1), at 571, for the proposition that a plaintiff had a right to restitution *at law* when the plaintiff had grounds for recovering money but "'could *not* assert title or right to possession of particular property'").

B. Unlike In *Great-West*, Respondent's Action Seeks Equitable Restitution Because It Seeks To Recover Specifically Identifiable Funds That Belong In Good Conscience To The Plan Rather Than To Impose Personal Liability On Petitioners

In this case, respondent satisfies all three of the conditions for equitable restitution identified in *Great-West*.

1. First, respondent seeks to recover specifically identifiable funds, *i.e.*, $74,869.37 of the proceeds of petitioners' third-party settlement. Pet. App. 11a, 31a. Respondent is therefore unlike the fiduciary in *Great-West*, who sought, "in essence, to impose personal liability on [the beneficiaries] for a contractual obligation to pay money," 534 U.S. at 210, and "could *not* assert title or right to possession of particular property." *Id.* at 213 (citation omitted).

2. Second, those settlement proceeds belong in good conscience to the plan. "[I]t is one of the familiar rules of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing." *Barnes* v. *Alexander*, 232 U.S. 117, 121 (1914); see *Walker* v. *Brown*, 165 U.S. 654, 664-665 (1897). As a prominent treatise, cited by the Court in *Great-West*, explains:

> It is well settled that an agreement * * * to assign * * * or to affect property not yet in existence, * * * or property to be acquired by [the promisor] in the future, although * * * it creates no legal estate or interest in the things when they afterwards come into existence or are acquired by the promisor, does constitute an equitable lien upon the property so * * * acquired at a subsequent time.

4 John N. Pomeroy & Spencer W. Symons, *Equity Jurisprudence*, § 1236, at 699-700 (1941) (footnote omitted); see *id.* at 701 (giving as "common examples" mortgages or leases,

"which purport to embrace future-acquired property of the mortgagor or lessee," and which, "although creating no legal interest in the property thus described, constitute an equitable lien"); *Peugh* v. *Porter*, 112 U.S. 737, 742 (1885) (noting, in rejecting argument that a claimant "has no equitable lien," that "there were words in the agreement * * * of express transfer and assignment of the very fund now in dispute, though not then in existence, which, in contemplation of equity, is not material").

That principle applies here because the plan terms expressly provide that "[a]ll recoveries from a third party (whether by lawsuit, settlement, or otherwise) *must be used* to reimburse the Company" for plan-paid medical benefits. J.A. 75 (emphasis added). Although the plan terms gave the plan no legal interest in petitioners' third-party recovery, they created an equitable interest in the recovery that would have been enforceable in a court of equity. In *Barnes*, the court held that a contract to pay an attorney out of the hoped-for recovery on a claim created a lien on the recovery enforceable in equity. 232 U.S. at 121 ("the moment the fund was received the contract attached to it"). As the Court explained in similar circumstances in *Wylie* v. *Coxe*, 56 U.S. (15 How.) 415, 420 (1853), it "is a sufficient ground for an equity jurisdiction" that "[t]he fund was looked to" in the contract, and "not the personal responsibility of the owner of the claim."[3]

Indeed, the principle that an insured must reimburse an insurer out of a third-party recovery has deep roots in equity. This Court has long recognized, in the context of property

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[3] For this reason, petitioners err in asserting (Br. 26) that respondent has no equitable action because "at the time the policyholder agrees to the plan terms or accepts medical benefits from the plan, she possesses no third-party recovery which she can appropriate to the plan." As the authorities cited in the text make clear, a person may grant an equitable lien on property that has not yet come into existence or into her possession.

insurance, that an insurer is subrogated to the rights of the insured to recovery from the third party. See *Hall & Long* v. *The Railroad Cos.*, 80 U.S. (13 Wall.) 367, 370 (1871) (right of insurer who "has indemnified the owner for the loss" to owner's claim against primarily liable third party "rests upon familiar principles of equity"); *Garrison* v. *Memphis Ins. Co.*, 60 U.S. (19 How.) 312, 317 (1856). The basis for that right is that "a mere payment of a loss, whether partial or total, gives the insurers an equitable title to what may afterwards be recovered from other parties on account of the loss." *Hall & Long*, 80 U.S. (13 Wall.) at 371 (citation omitted). Possessing an "equitable title" means that when the insurer pays for a property loss and the insured recovers from a third party responsible for the loss, the insured "holds [the amount recovered] in trust for the insurers, and they may recover it from him by a suit in equity." *Monmouth County Mut. Fire Ins. Co.* v. *Hutchinson*, 21 N.J. Eq. 107, 117 (N.J. 1870).[4]

To be sure, there was at one time some question about the extent to which a right of subrogation would be recognized in personal injury, as opposed to property damage, actions. But by the time ERISA was enacted in 1974, Pub. L. No. 93-406, 88 Stat. 832-833, a large majority of state courts to address the issue had recognized an insurer's subrogation or reimbursement rights under policies of medical or automobile

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[4] Although *Hall & Long* and *Garrison* involved suits against the third party rather than the insured, the Court in *Garrison* also addressed the situation where the third party (as here) had already settled with the insured. The Court cited a case in which "an insurer enforced a lien on a judgment recovered by the assured for a loss," and noted that such cases "show that an insurer may apply to equity whenever an impediment"—*i.e.*, the satisfaction of the claim by the third party—"exists to the exercise of his legal remedy in the name of the assured." 60 U.S. (19 How.) at 317.

insurance.[5] Those courts had thus rejected arguments, accepted by a minority of courts, that permitting subrogation or reimbursement would violate common-law prohibitions against assigning or splitting a personal-injury cause of action. See, *e.g.*, *Rinehart* v. *Farm Bureau Mut. Ins. Co.*, 524 P.2d 1343, 1344-1346 (Idaho 1974) (discussing cases).[6] Those

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[5] See *Rinehart* v. *Farm Bureau Mut. Ins. Co.*, 524 P.2d 1343, 1345 & n.2 (Idaho 1974); *Alabama Farm Bureau Mut. Cas. Ins. Co.* v. *Anderson*, 263 So. 2d 149, 151-154 (Ala. App.), cert. denied, 263 So. 2d 155 (Civ. 1972); *Blocker* v. *National Disc. Ins. Co.*, 493 P.2d 825, 826 (Okla. 1972); *Harris* v. *Huval Baking Co.*, 265 So. 2d 783, 784-786 (La. Ct. App.), writ denied, 267 So. 2d 210 (La. 1972); *Inel* v. *Travelers Indem. Co.*, 281 N.E.2d 919, 921 (Ind. Ct. App. 1972); *Jacobson* v. *State Farm Mut. Auto. Ins. Co.*, 491 P.2d 168, 170 (N. M. 1971); *Foundation Reserve Ins. Co.* v. *Cody*, 458 S.W.2d 214, 216-217 (Tex. Civ. App. 1970); *Geertz* v. *State Farm Fire & Cas.*, 451 P.2d 860, 862 (Or. 1969); *Travelers Indem. Co.* v. *Rader*, 166 S.E.2d 157, 159-162 (W. Va. 1969); *State Farm Mut. Ins. Co.* v. *Farmers Ins. Exch.*, 450 P.2d 458, 458-459 (Utah 1969); *Higgins* v. *Allied Am. Mut. Fire Ins. Co.*, 237 A.2d 471, 472 (D.C. 1968); *Shipley* v. *Northwestern Mut. Ins. Co.*, 428 S.W.2d 268, 270 (Ark. 1968); *National Union Fire Ins. Co.* v. *Grimes*, 153 N.W.2d 152, 153-155 (Minn. 1967); *Hospital Serv. Corp.* v. *Pennsylvania Ins. Co.*, 227 A.2d 105, 109 (R.I. 1967); *Demmery* v. *National Union Fire Ins. Co.*, 232 A.2d 21, 24-26 (Pa. Super. 1967); *Busch* v. *Home Ins. Co.*, 234 A.2d 250, 251-252 (N.J. Super. Ct. App. Div. 1967); *Associated Hosp. Serv., Inc.* v. *Milwaukee Auto. Mut. Ins. Co.*, 147 N.W.2d 225, 226-227 (Wis. 1967); *Travelers Indem. Co.* v. *Godfrey*, 230 N.E.2d 560, 562-563 (Ohio Ct. Common Pleas 1967); *Wilson* v. *Tennessee Farmers Mut. Ins. Co.*, 411 S.W.2d 699, 701-702 (Tenn. 1967); *DeCespedes* v. *Prudence Mut. Cas. Co.*, 193 So. 2d 224, 226-228 (Dist. Ct. App. 1966), aff'd, 202 So. 2d 561 (Fla. 1967); *Bernardini* v. *Home & Auto. Ins. Co.*, 212 N.E.2d 499, 501 (Ill. App. Ct. 1965); *Miller* v. *Liberty Mut. Fire Ins. Co.*, 264 N.Y.S.2d 319, 321-323 (N.Y. Sup. Ct. 1965); cf. *Michigan Med. Serv.* v. *Sharpe*, 64 N.W.2d 713, 714 (Mich. 1954) (recognizing subrogation but denying equity jurisdiction because plaintiff had an adequate remedy at law).

[6] The prohibitions against assignment or splitting a personal-injury cause of action were not based on any principles unique to equity. See, *e.g.*, *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 320 (1927); *Baird* v. *United States*, 96 U.S. 430, 432 (1877); *Comegys* v. *Vasse*, 26 U.S. (1 Pet.) 193, 213 (1828). Thus, even the rationale adopted by the minority of courts does not suggest that Section 502(a)(3)'s grant of authority to award "equitable" relief imposes

decisions confirm that, when an ERISA plan specifically requires a third-party recovery to be used to reimburse the plan for medical benefits it paid, as here, the proceeds in good conscience belong to the plan up to the amount that it has expended, and the obligation to transfer the proceeds to the plan may be enforced in equity.

3. Third, the equitable doctrine of tracing permits respondent to recover the settlement proceeds it requests from petitioners' investment accounts because petitioners deposited the proceeds into their investment accounts. Pet. App. 6a, 31a. "Tracing was a creation of equity and has remained almost entirely the sole province of equity." 1 Palmer § 2.14, at 177. Tracing permits a court to recover funds after they have been commingled with other funds by giving the claimant "an equitable lien on the entire commingled fund, which continues as to any balance remaining in the fund." *Id.* § 2.16, at 196; see, *e.g.*, *National Bank* v. *Insurance Co.*, 104 U.S. 54, 66-72 (1881) (commingled bank account). *A fortiori*, tracing permits respondent to recover the funds from petitioners' investment accounts, which they agreed to preserve during this lawsuit.

C. Petitioners' Arguments That The Relief Sought In This Case Is Not Equitable Are Without Merit

Petitioners admit that "as a matter of fairness" it is "perhaps true" that the funds in question belong in good conscience to the plan. Pet. Br. 21. They argue, however, that, to obtain equitable relief the plan must also show that the funds can be traced back to the funds used by the plan to pay medical benefits, that the plan lacks an adequate legal remedy, and that the plan fits within a specific exception to a purported general rule in equity prohibiting recovery of money

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an implied limitation on the availability of relief to enforce a constructive trust or equitable lien on a recovery for personal injuries.

based on a contract. *Id.* at 19-30. None of those arguments is correct.

1. No rule of equity requires the plan to show that its payments of benefits can be traced through petitioners' tort recovery from a third party and into petitioners' investment accounts. A court in equity could impose a constructive trust "upon any identifiable kind of property or entitlement in the defendant's hands if, in equity and conscience, it belongs to the plaintiff." 1 Dobbs § 4.3(2), at 589-590. Tracing allows a court to impose a constructive trust or equitable lien on property even after it has been transferred to third parties, so long as they are not bona fide purchasers. *Id.* at 590.

a. This Court's decision in *Barnes* illustrates those principles. In *Barnes*, a law firm recovered one-fourth of a settlement pursuant to a contingent fee agreement. 232 U.S. at 119. The appellant, Mrs. Barnes, obtained that law firm's interest. See *ibid.* A second law firm claimed one-third of the first law firm's recovery pursuant to an agreement under which the second law firm would be paid out of the recovery. *Id.* at 119, 121. This Court held that the second law firm had a lien on the recovery, *id.* at 121-122, and "[h]aving a lien upon the fund, as soon as it was identified they could follow it into the hands of the appellant Barnes." *Id.* at 123. The Court thereby allowed the second law firm to follow property and recover it based on the firm's equitable lien. The Court did not require the second law firm to show that the money it sought to recover could be traced back to funds that firm used to pay expenses it incurred pursuant to its agreement with the first law firm. It was sufficient that the first law firm, and then Mrs. Barnes, had received money from *the client's* settlement, a portion of which, in equity and good conscience, belonged to the second law firm.

Under similar reasoning, the plan here need only show that the funds it seeks to recover can be traced back to the

property on which it has an equitable lien, *i.e.*, the funds petitioners obtained in their third-party settlement, which petitioners previously agreed "must be used" to reimburse the plan. J.A. 75. Indeed, this case is simpler than *Barnes*, because the settlement funds have not been transferred by petitioners to a third party, but are still being held by petitioners and preserved for payment to respondent if it prevails in this case. Pet. App. 6a. The plan does not have to trace the funds petitioners received in settlement back to the funds the plan paid for medical expenses. Consistent with *Great-West*, a plan fiduciary's action for equitable restitution need only seek specific money or property that is in the defendant's possession and that belongs in good conscience to the plaintiff.

b. Petitioners' own authorities are consistent with the rule that a constructive trust or equitable lien need not arise from a plaintiff's claim to property that once belonged to the plaintiff, though of course in some cases it will so arise. For example, the section of the Dobbs treatise cited by petitioners (Br. 19-20) does not purport to set forth a general limitation on all constructive trusts. Instead, under the general heading "[t]racing," that section simply illustrates how a constructive trust operates to "allow[] the plaintiff the gain produced by his property." 1 Dobbs § 4.3(2), at 592. The treatise states that "[e]specially when the defendant has taken money, tracing is difficult" and involves "a series of special rules for tracing money." *Id.* at 592-593. The treatise concludes that, under those tracing rules, "[i]f the tracing is incomplete, the rule that requires a *res* is invoked and the constructive trust is denied." *Id.* at 593. The quoted passage thus establishes that "when the defendant has taken money" belonging to the plaintiff, the plaintiff may obtain gains produced by that money only if the plaintiff can trace the gains back to the money the defendant obtained from the plaintiff. The use of that illustration says nothing about other forms of construc-

tive trusts that do *not* arise from a defendant's misappropriation of money originally belonging to the plaintiff, and it certainly does not purport to limit constructive trusts or equitable liens to cases involving such misappropriations. Thus, where, as here, the constructive trust or equitable lien is imposed in the first instance on funds received by a plan beneficiary from a third party, it is necessary only to trace money in the hands of a subsequent transferee back to those funds received by the beneficiary.

Petitioners similarly cite for the same proposition (Br. 20) the Restatement (Second) of Trusts § 202, at 444 (1959), which states that "[w]here the trustee by the wrongful disposition of trust property acquires other property," the acquired property may be subjected to a constructive trust or equitable lien only if it is "the product of the trust property" and "can be traced." That Restatement section, which is entitled "Following Trust Property into Its Product," also merely states the rule for tracing trust property that is subject to a constructive trust because it was misappropriated, not any rule defining the requirements for constructive trusts or equitable liens that arise in other circumstances.

In short, petitioners' authorities do not purport to define any general rule that *all* varieties of constructive trust or equitable lien must originate in property that was in the plaintiff's possession or to which the plaintiff had legal title. To the contrary, the authorities that do address that question make clear that neither wrongdoing nor the existence of property originally belonging to the plaintiff is necessary. See *Moore* v. *Crawford*, 130 U.S. 122, 128 (1889) ("Whenever the legal title to property is obtained through means or under circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably enti-

tled to the same, although he may never, perhaps, have had any legal estate therein.") (internal quotation marks and citation omitted); *Harris Trust & Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 251 (2000) ("that a transferee was not 'the original wrongdoer' does not insulate him from liability [under Section 502(a)(3)] for restitution"); 1 Dobbs § 4.3(3), at 602 ("Neither remedy [*i.e.*, constructive trust or equitable lien] is limited to cases of wrongdoing or dishonorable conduct by the defendant."). And that principle is consistent with the recognition that a lien can be triggered not just by the defendant's misappropriation of funds or property from the plaintiff, but also by the receipt of funds or property from a third party that, based on a prior obligation, belong to the plaintiff.[7]

2. Likewise, there is no requirement that the plan lack an adequate remedy at law to bring an action for equitable restitution. Although certain claims in equity could be dismissed if the chancellor thought the plaintiff would have an adequate remedy at law, "[t]he constructive trust claim is different" because "[i]t is not a claim based on a legal right. On the contrary, constructive trusts are needed because legal title is in the defendant." 1 Dobbs § 4.3(2), at 595. Similarly, the bare availability of some legal remedy is no bar to equity jurisdiction to enforce an equitable lien. As this Court has explained, "[t]here may be a legal remedy, and yet if a more complete remedy can be had in chancery, it is a sufficient ground for [equity] jurisdiction." *Wylie*, 56 U.S. (15 How.) at 420.

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[7] Petitioners' retention of the settlement proceeds, with knowledge of the plan's reimbursement right, is in any event wrongful. Accordingly, even if wrongful conduct were required, the plan could trace the settlement proceeds into petitioners' investment accounts. See *Moore*, 130 U.S. at 128 ("Fraud * * * in the sense of a court of equity properly includes all acts, omissions, and concealments which involve breach of legal or equitable duty * * * or by which an undue and unconscientious advantage is taken of another.").

Moreover, even if lack of an adequate legal remedy were required, that condition is satisfied here because the plan lacks an adequate legal remedy. Under *Great-West* and *Mertens*, a plan cannot sue under ERISA for legal relief. And because of the breadth of ERISA's preemption provision, 29 U.S.C. 1144(a), and the exclusivity of the causes of action under Section 502(a) of ERISA, see, *e.g.*, *Aetna Health, Inc.* v. *Davila*, 542 U.S. 200, 208-209 (2004), a state-law cause of action by a plan against a participant or beneficiary to enforce a reimbursement provision of an ERISA plan would appear to be preempted on the ground that the state law and the cause of action "relate to" the plan. See *FMC Corp.* v. *Holliday*, 498 U.S. 52, 58-60 (1990) (state law prohibiting subrogation or right of reimbursement by plan preempted by ERISA); *Funk Mfg. Co.* v. *Franklin*, 927 P.2d 944, 947-949 (Kan. 1996) (reimbursement action preempted); *Liberty Northwestern Ins. Corp.* v. *Kemp*, 85 P.3d 871, 877-881 (Or. Ct. App.) (same), review denied, 93 P.3d 71 (Or. 2004); *MEBA Med. & Benefits Plan* v. *Lago*, 867 So. 2d 1184, 1188-1190 (Fla. Dist. .Ct. App. 2004) (same); but see *Providence Health Plan* v. *McDowell*, 385 F.3d 1168, 1171-1173 (9th Cir. 2004) (ERISA does not preempt plan's state-law reimbursement action), cert. denied, 125 S. Ct. 1726 and 1735 (2005); *Hamrick's, Inc.* v. *Roy*, 115 S.W.3d 468, 474-476 (Tenn. Ct. App. 2003) (similar). Prohibiting a plan's action for equitable reimbursement under Section 502(a)(3) of ERISA would therefore likely mean that plan terms calling for reimbursement are effectively unenforceable in law *or* equity.[8]

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[8] Petitioners also argue that the plan could have intervened in their state-court suit in California to assert subrogation rights against the third parties. Pet. Br. 21 n.8, 29. It is not at all clear that a plan fiduciary can intervene in a state-court tort suit, however, particularly in a State such as California that does not permit subrogation in personal injury cases. See *Great-West*, 534 U.S. at 220 (expressing no opinion on permissibility of intervention); *Fifield Manor*

3. a. Finally, the plan's request for equitable reimbursement, through enforcement of a constructive trust or equitable lien on the proceeds of petitioners' third-party settlement, cannot be defeated by characterizing the plan's claim as a legal claim for money based on a contract, *i.e.*, the plan's reimbursement provision. Pet. Br. 24-27. As discussed above, this Court has recognized "one of the familiar rules of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing." *Barnes*, 232 U.S. at 121. The Court applied that principle to a settlement fund in *Barnes*, thus establishing that a claim for money based on a contract is enforceable in equity when the contract requires conveyance of a specific fund of money. See *Wylie*, 56 U.S. (15 How.) at 420. In this case, the plan's terms require that third-party settlements "must be used" to reimburse the plan. J.A. 75. Petitioners' reliance (Br. 26) on *Taylor* v. *Wharton*, 43 App. D.C. 104 (D.C.), cert. denied, 238 U.S. 631 (1915), is therefore misplaced because in *Taylor* "there was no appropriation of the fund and no agreement that [the plaintiff] should be paid out of it." 43 App. D.C. at 109. Accordingly, even if the plan's action is characterized as contractual in nature—in the sense of being based on petitioners' contractual undertaking to reimburse the plan out of funds they received from a third-party tortfeasor—that does not defeat respondent's right to equitable reimbursement.

b. Contrary to petitioners' suggestion (Br. 22), this Court's decision in *Gaines* v. *Miller*, 111 U.S. 395 (1884), does

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v. *Fonston*, 354 P.2d 1073, 1076-1079 (Cal. 1960) (no subrogation). Moreover, in cases in which the beneficiary obtains a settlement of a claim before suit is filed or in which the insurer does not find out about the suit until it has already been settled or otherwise resolved, there would be no suit in which the plan could intervene. The availability of an ERISA remedy, therefore, should not turn on that fortuity.

not require a person with an equitable claim to particular funds to recover the money through an action at law for assumpsit, rather than an action in equity. In *Gaines*, a claimant sued in equity to obtain the proceeds from a sale of land, which she had ratified, from her father's estate. *Id.* at 397. This Court held that the court had no jurisdiction in equity over the case, explaining that "[t]here is no averment in the bill of complaint of any ground of equity jurisdiction" because "[t]he appellant has no lien on [the deceased's] estate and avers none." *Id.* at 398. It was in that context that the Court in *Gaines* commented that it was, "therefore, simply a case of money had and received" that is recoverable by an "adequate and complete" remedy at law. *Id.* at 397-398. See also *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 49 & n.7 (1989) (bankruptcy action to set aside fraudulent transfer is characterized as a legal suit for money where bankruptcy trustee did not request a specifically equitable form of relief).

In this case, the plan has specifically asserted an equitable lien on the proceeds of the third-party settlement petitioners received, and the plan is entitled to such a lien because its terms provide that the third-party recovery "must be used" to reimburse the plan. J.A. 75. Accordingly, unlike in *Gaines*, where the plaintiff did not have, and did not assert, such a lien, the plan in this case asserts an equitable lien and would have been entitled to enforce it in equity at the time of the divided bench.

c. Similarly, there is no good reason for the Court to deny enforcement of the governing plan terms based on petitioners' argument that a court in equity would generally refuse to enforce a contractual lien, but rather would only "imply a lien when an intended contractual lien could not be enforced at law because of some technical defect." Pet. Br. 27. In many of the cases cited above, the sole source for the equitable lien or constructive trust was a contractual undertaking that a

particular fund should be the property in whole, or in part, of the plaintiff. See *Barnes*, 232 U.S. at 121; *Walker*, 165 U.S. at 664-665; *Peugh*, 112 U.S. at 742; *Wylie*, 56 U.S. (15 How.) at 420; see also *Fourth St. Nat'l Bank* v. *Yardley*, 165 U.S. 634, 653 (1897) (based on circumstances of a contract, concluding that "it was intended that the particular fund * * * should be transferred and appropriated *pro tanto*" for the purpose of paying a check, and that therefore relief on the bill in equity to enforce the resulting equitable lien should be granted). In any event, adopting petitioners' rule for ERISA plans would lead to the anomalous result that a poorly drafted plan reimbursement term could be enforced under Section 502(a)(3), while a clearly written one could not.

D. This Court Should Resolve Any Doubts About The Scope Of "Equitable Relief" Under Section 502(a)(3) In Favor Of Its Availability To Enforce Valid Plan Terms

As demonstrated above, applying traditional principles of equity yields the result that the action in this case may be brought under Section 502(a)(3). Insofar as there remains any doubt, however, it should be resolved in favor of permitting actions to enforce legally valid ERISA plan terms.

Not all questions about the precise scope of equity jurisdiction or about the precise dividing line between legal and equitable authority reached a clear or definitive resolution before the fusion of law and equity in the federal system. See Fed. R. Civ. P. 2. Nor is there any reason to believe that all such questions have since been resolved once and for all by doctrines that perpetuate the distinction. When Congress authorized actions for "equitable relief" in Section 502(a)(3) of ERISA in 1974, it surely incorporated the kind of flexibility in equitably remedying injustice that characterized the equitable side of the bench. Accordingly, care should be exercised before assuming that any single case or other authority is dispositive in setting forth limits on the scope of "equitable

relief" under ERISA, especially when other cases or authorities point in the opposite direction.

It is also entirely consistent with standard equity practice to construe and apply equitable jurisdiction in accord with the policies embodied in particular legislation. "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief *in light of the statutory purposes*." *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960) (emphasis added); *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946); see *Great-West*, 534 U.S. at 228 (Ginsburg, J., dissenting). When Congress in Section 502(a)(3) authorized courts to grant "appropriate equitable relief," Congress thus intended that if particular relief that is appropriate in the circumstances can fairly be analogized to relief that was within the outer boundaries of the authority of courts of equity, it should be available to advance ERISA's statutory purposes. Congress deliberately entrusted to the federal courts the authority in actions under Section 502 to develop a "federal common law of rights and obligations under ERISA-regulated plans." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987). Section 502(a)(3) should be construed to confer on the courts a corresponding measure of flexibility in drawing on equitable principles to fashion appropriate relief.

A core purpose of ERISA is to authorize reasonably efficient and effective enforcement of plan terms that comply with the statute. In enacting ERISA, Congress intended generally to promote the interests of participants and beneficiaries in employee benefit plans, 29 U.S.C. 1001(b), but Congress stopped short of requiring employers to establish such plans. *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996). Congress also excluded welfare plans, defined to include plans that provide health benefits, 29 U.S.C. 1002(1), from

ERISA's minimum vesting, participation, and funding requirements applicable to pension plans. 29 U.S.C. 1051, 1081(a); *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 78 (1995). Because, in general, "ERISA itself 'does not regulate the substantive content of welfare-benefit plans,'" an employer "is 'generally free under ERISA, for any reason at any time, to adopt, modify, or terminate [its] welfare pla[n].'" *Inter-Modal Rail Employees Ass'n* v. *Santa Fe Ry.*, 520 U.S. 510, 515 (1997)(citations omitted).[9] Congress gave employers such flexibility because requiring the vesting of welfare benefits "would seriously complicate the administration and increase the cost of plans." *Inter-Modal*, 520 U.S. at 515 (quoting S. Rep. No. 383, 93d Cong., 1st Sess. 51 (1973)). Ultimately, limiting the enforceability of permissible plan terms would likely decrease the benefits employers choose to make available to employees.

Accordingly, enforcing plan terms that are lawful under ERISA itself—such as the term in this case requiring reimbursement—substantially furthers Congress's overall purpose of encouraging sponsors to form ERISA plans and thereby encouraging employers to provide benefits to employees consistent with the statute. By contrast, prohibiting reimbursement or making reimbursement difficult or impossible to enforce would impose a restriction on the design and implementation of plans that Congress did not include in ERISA. It would pressure self-insured plans, the kind at issue here, Pet. App. 37a, either to increase premiums or reduce benefits. See *FMC Corp.*, 498 U.S. at 61-65 (ERISA preempts state anti-subrogation law as applied to self-insured

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[9] If an employer or other plan sponsor decides to provide health benefits, ERISA does limit their ability under certain circumstances to exclude individuals from enrolling in the plan and to exclude certain types of coverage. See 29 U.S.C. 1181-1191c. Those provisions are not at issue here.

plans, but not insured, plans).[10] And, notwithstanding the contentions of amicus (Ass'n of Trial Lawyers of Am. Br. 24-27), limiting the ability of plans efficiently to enforce reimbursement provisions necessarily imposes higher costs on insurers and thus tends to increase the costs (and decrease the benefits) of insured plans as well.[11]

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[10] That is because an employer who self-insures directly reduces its costs by recovering those costs from a third-party. For a small plan with a large claim, or a large plan with many claims, the ability to recover medical benefits payments could therefore make a substantial difference in the plan's ability to pay for other claims. In any event, the recent flurry of litigation about reimbursement—including this case and two others this Term presenting reimbursement questions in different contexts, see *Arkansas Dep't of Health & Human Servs* v. *Ahlborn*, cert. granted, No. 04-1506 (Sept. 27, 2005) (Medicaid); *Empire Healthchoice Assurance* v. *McVeigh*, cert. granted, No. 05-200 (Jan. 6, 2006) (Federal Employees Health Benefits Act (FEHBA)) —suggests that substantial sums are at stake. Because reimbursement requirements are common in other contexts, including Medicare, Medicaid, FEHBA, and private insurance, ERISA plans should not be uniquely foreclosed from enforcing them.

[11] State laws limiting reimbursement may of course apply to insured ERISA plans if those state laws are directed to insurance. See *FMC Corp.*, 498 U.S. at 60-61 ("no dispute" that Pennsylvania anti-subrogation law, as applied to insured plans, is saved from preemption under ERISA's insurance savings clause, 29 U.S.C. 1144(b)(2)(A)); *Singh* v. *Prudential Health Care Plan, Inc.*, 335 F.3d 278, 286 (4th Cir.) (Maryland anti-subrogation law is saved), cert. denied, 540 U.S. 1073 (2003); *Medical Mut.* v. *deSoto*, 245 F.3d 561, 573 (6th Cir. 2001) (same for California law); cf. *Levine* v. *United Health Care Corp.*, 402 F.3d 156, 165-166 (3d Cir.) (New Jersey law is not saved because it is not directed at insurance), cert. denied, 126 S. Ct. 747 (2005). Thus, with respect to insured plans, the States retain control of the decision whether a plan term requiring reimbursement is a legal and enforceable plan term. The Department of Labor estimates that ERISA covers approximately 2.5 million job-based health plans and 135 million participants and beneficiaries, and that 300,000 of these plans, covering 78 million individuals, are self-insured. Employee Benefits Sec. Admin., United States Dep't of Labor, *Fact Sheet; Association Health Plans* (Apr. 2005) <http://www.dol.gov/ebsa/newsroom/fsahp.html>.

E. The Relief Sought In This Case Is Appropriate And Consistent With ERISA's Purposes

This Court has not defined when relief is "appropriate" under Section 502(a)(3), which the Court has described as a "catchall" provision that acts "as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Varity Corp.* v. *Howe*, 516 U.S. 489, 512 (1996).[12] The Court has instructed the lower courts, however, to "keep in mind the 'special nature and purpose of employee benefit plans.'" *Id.* at 515 (quoting *Pilot Life Ins.*, 481 U.S. at 54). In this case, the relief respondent seeks is "appropriate" because it is consistent with the nature and purposes of an ERISA benefit plan.

1. As explained above, permitting the equitable reimbursement action at issue here is "appropriate" because it gives effect to Congress's choice to allow an employer to decide whether to offer a health benefits plan and, in general, how to structure the kinds of benefits offered. It helps a fiduciary satisfy his obligation "to preserve assets to satisfy future, as well as present, claims" and "to take impartial account of the interests of all beneficiaries." *Varity*, 516 U.S. at 514. The equitable reimbursement action is also fair to participants and beneficiaries who obtain a tort recovery, because it provides them with precisely what they were promised: immediate payment of medical benefits by the plan followed by reimbursement in the event of a third-party recovery. See *Great-West*, 534 U.S. at 210 (prohibiting reimburse-

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[12] Title I of ERISA uses the term "appropriate" in a number of places to describe available relief, see 29 U.S.C. 1024(a)(5)(C), 1109(a), 1132(a)(2), (4), (5), (8) and (9), but does not define the term. The dictionary definition offers little guidance. See *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 683 (1983) (difficult to draw meaningful guidance from term "appropriate," "which means only 'specially suitable: fit, proper'") (quoting *Webster's Third New Int'l Dictionary* 106 (1976)).

ment action under Section 502(a)(3) that imposed personal liability). Finally, precluding actions for reimbursement would permit and encourage participants and beneficiaries to obtain double recoveries for medical costs—once from the plan and once in the tort recovery. Enforcing plan terms calling for reimbursement would eliminate that inequitable and wasteful result.

2. Petitioners argue that reimbursement in this case is not "appropriate," because "no determination has ever been made that any of the $750,000 recovered by [petitioners] was compensation for past medical expenses that were paid by [respondent]." Pet. Br. 34. Petitioners thus advocate a "make whole" theory, according to which an insurer may not obtain subrogation or reimbursement from a third-party tort recovery until the insured has been made whole for all other injuries. See, *e.g.*, *Copeland Oaks* v. *Haupt*, 209 F.3d 811, 813 (6th Cir. 2000) (applying "make whole" rule as ERISA default rule in absence of clear contractual provision to the contrary). In petitioners' view, without such a "make whole" showing, a court could not conclude that the $750,000 was "an unjust enrichment which has accrued to [petitioners]" that can be awarded as "appropriate equitable relief." Pet. Br. 34.[13]

This Court need not consider petitioners' argument. They failed to establish in the district court that their $750,000 tort recovery is less than a "make whole" award for all of the injuries they suffered, including the injuries for which the plan paid medical expenses. See *Hamrick's*, 115 S.W.3d at 476

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[13] The theory of respondent's action under Section 502(a)(3) is that $74,869.37 of petitioners' recovery from third parties belongs in good conscience to the plan, because petitioners were obligated by the plan's terms to reimburse the plan from the recovery. Petitioners' assertion that they are not unjustly enriched if they have not first used the tort recovery to pay *other* expenses or to compensate them for *other* injuries lacks any comparable grounding in the terms of the ERISA plan, which, as Section 502(a)(3) itself makes clear, are to govern in an action for appropriate equitable relief such as this.

(party relying on make whole doctrine has burden of proving that he or she was not made whole). Nor did they argue in the court of appeals or in their petition for certiorari that they were not made whole by the recovery. In addition, this case is a particularly unlikely case for application of "make whole" principles because the third-party recovery dwarfs the plan's claim for reimbursement. See Pet. App. 15a ($750,000 third-party recovery and $74,869.37 reimbursement claim). Accordingly, even if petitioners were correct that an insurer may not be awarded reimbursement until the insured has been made whole, there would be no basis in this case to reduce or eliminate the judgment in respondent's favor.[14]

3. In any event, nothing in ERISA prohibits a plan sponsor from adopting plan terms that require full reimbursement for payment of medical expenses, and ERISA's goal of minimizing the costs to employers of providing welfare benefits, see *Inter-Modal*, 520 U.S. at 515, would be furthered by allowing it to do so. Cf. *United States* v. *Lorenzetti*, 467 U.S. 167, 177 (1984) (Federal Employees Compensation Act's goal of minimizing costs requires employee who receives workers' compensation benefits to use a third-party recovery to repay the government "regardless of whether the third-party recovery includes compensation for losses other than medical ex-

[14] The Court also has no occasion to consider whether a plan in a reimbursement action should be charged a proportionate share of the attorney's fees a participant or beneficiary incurs in obtaining a third-party recovery. See Ass'n of Trial Lawyers of Am. Amicus Br. 29-30 (arguing for such fee sharing); *Bombardier Aerospace Employee Welfare Benefits Plan* v. *Ferrer, Poirot & Wansbrough*, 354 F.3d 348, 360-362 (5th Cir. 2003) (plan terms may preclude fee sharing), cert. denied, 541 U.S. 1072 (2004); *Administrative Comm. of the Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan* v. *Varco*, 338 F.3d 680, 692 (7th Cir. 2003) (same), cert. denied, 542 U.S. 945 (2004); *Yerby* v. *United Healthcare Ins. Co.*, 846 So. 2d 179, 190-191 (Miss. 2002) (no fee sharing unless plan terms provide for it). The plan here paid its share of attorney's fees, and neither party has sought review of that issue.

penses and lost wages").[15] The lower courts have generally recognized that clear plan terms must be given effect, notwithstanding arguments to apply "make whole" principles. See, *e.g.*, *Copeland Oaks*, 209 F.3d at 813; *Cagle* v. *Bruner*, 112 F.3d 1510, 1521 (11th Cir. 1997); *Barnes* v. *Independent Auto. Dealers Ass'n of Cal. Health & Welfare Benefit Plan*, 64 F.3d 1389, 1394 (9th Cir. 1995); *Cutting* v. *Jerome Foods, Inc.*, 993 F.2d 1293, 1297 (7th Cir.), cert. denied, 510 U.S. 916 (1993). Petitioners do not dispute that the relevant terms in this case are clear in requiring reimbursement, see Pet. Br. 33-34, and they therefore should be enforced.[16]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[15] Among other things, the full reimbursement provision avoids the potential for strategic behavior in structuring a settlement by the insured and tortfeasor, who generally will have little reason to resist classifying damages as flowing from something other than medical costs.

[16] This case therefore does not present any question of invoking the "federal common law of rights and obligations under ERISA-regulated plans," *Pilot Life*, 481 U.S. at 56, in construing ambiguous plan terms. Cf. *Copeland*, 209 F.3d at 813. The case likewise does not present the question whether a court, because of extraordinary circumstances in a particular case, could limit the enforceability of a plan term by applying applicable equitable principles.

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In The
Supreme Court of the United States

JOEL SEREBOFF and MARLENE SEREBOFF,
Petitioners,

v.

MID ATLANTIC MEDICAL SERVICE, INC.,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMICUS CURIAE BRIEF OF AMERICA'S HEALTH INSURANCE PLANS, INC., AMERICAN BENEFITS COUNCIL, AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF RESPONDENT

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I.
IDENTITY AND INTEREST OF THE *AMICI CURIAE*[1]

A. The *Amici*

This brief is being filed by three *amici curiae*, America's Health Insurance Plans, Inc. ("AHIP"), American Benefits Council ("ABC"), and the National Association of Manufacturers ("the NAM"), (collectively, the "*Amici*"), all of which maintain a common interest in the result of the instant Petition.[2]

America's Health Insurance Plans, Inc. is the national association representing the private health plan and insurer community. AHIP's mission is to advance health care quality and affordability through leadership in the health care community, advocacy, and the provision of services to its members. AHIP represents nearly 1,300 member companies that administer or insure benefits, including health, pharmaceutical, long-term care, disability, and supplemental coverage, to more than 200 million Americans, the majority of whom are participants in or beneficiaries of employee benefit plans under the Employee Retirement Income

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[1] This brief was prepared in its entirety by *Amici* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *Amici*, their members, and their counsel.

[2] All parties have consented to the filing of this brief in written consents filed with the Court on January 11, 2006, and January 13, 2006.

Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*

The American Benefits Council is a broad-based, nonprofit trade association founded in 1967 to protect and foster the growth of this nation's privately sponsored employee benefit plans. The Council's members include both small and large employer-sponsors of employee benefit plans, including many Fortune 500 companies. Its members also include employee benefit plan support organizations, such as actuarial and consulting firms, insurers, banks, investment firms, and other professional benefit organizations. Collectively, its more than 250 members sponsor and administer plans covering more than 100 million plan participants and beneficiaries.

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

B. Interests of the *Amici*

Employee benefit plan reimbursement provisions (also used herein to include plan subrogation provisions), such as those at issue in this case, are used extensively throughout the

insurance and managed care industries for both insured and self-funded employee benefit plans. Such provisions generally require a plan participant (or beneficiary) to reimburse the plan for funds expended on the participant's behalf, if the participant recoups money from a third party responsible for the participant's injuries.

The ability of ERISA plans to seek reimbursement of benefits from plan participants who have recovered funds from third parties is important to their continued financial security. Reimbursement provisions are critical cost-saving devices for employers and other plan sponsors facing strong health care cost inflation pressures. Hundreds of millions of dollars, at least, are recouped annually by employee health benefit plans offered, insured, or administered by the *Amici*'s member organizations by virtue of reimbursement recovery mechanisms.[3]

The cost savings achieved by subrogation recoveries are passed on to employers and employees in the form of lower health care costs, making health care coverage more available and affordable. The *Amici* are concerned that the Court's adoption of

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[3] During fiscal year 2003, one of the largest private health care claims recovery services in the United States recovered $235.9 million in health claims, and had a backlog of over $1.5 billion of potentially recoverable claims. *See* Trover Solutions, Inc., Form 10-K, for the fiscal year ended Dec. 31, 2003, at 29. Based on the recoveries made by this service, and the number of lives covered (approximately 40 million), it can be estimated that more than $1 billion is recovered annually on behalf of all plans.

Petitioners' position in this case would render plan reimbursement provisions unenforceable with the following adverse effects:

- the cost of providing employee health plan benefits would rise, deterring employers from sponsoring and funding employee benefit plans;

- additional costs would be shifted to participants and beneficiaries, deterring participation in employee benefit plans;

- some participants and beneficiaries would be unjustly enriched by retaining double recoveries, at the expense of the plan and other participants and beneficiaries;

- fiduciaries would be unable to administer employee benefit plans in accordance with plan documents; and

- the national uniformity of administering plan provisions would be sacrificed, creating an administrative burden for plan administrators.

II.
SUMMARY OF ARGUMENT

ERISA Section 502(a)(3) specifically authorizes civil actions ". . . (B) to obtain other appropriate equitable relief . . . (ii) to enforce . . . the terms of [a] plan." ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 220-21 (2002), in a 5-4 decision, this Court precluded the insurer of an employee benefit plan from enforcing a plan reimbursement provision because, under the particular facts of that case, the relief sought was determined not to constitute "equitable relief" within the meaning of Section 502(a)(3). Unlike *Knudson*, this case requires the Court to squarely address the issue of whether it is reasonable to conclude that Congress, in enacting ERISA, intended to preclude an employee benefit plan from **ever** being able to enforce under ERISA a vital and customary provision of employee benefit health plans.

In *Knudson*, the majority specifically held that a plan reimbursement and/or subrogation provision could not be enforced against a plan participant (or beneficiary) who was **never in possession of the settlement funds at issue**. Notably, the majority explicitly distinguished situations involving the enforceability of plan reimbursement provisions where, as here, a party **in possession of the settlement funds** has been sued. *Knudson*, 534 U.S. at 214. The majority explained that equitable restitution generally was available if "money or property . . . belonging in good conscience to the plaintiff could clearly be traced to particular funds or

property in the defendant's possession." *Knudson*, 534 U.S. at 213 (*citing* 1 D. Dobbs, Law of Remedies § 4.3, at 587-88 (2d ed. 1993); Restatement of Restitution, Comment *a*, at 641-42 (1936); 1 G. Palmer, Law of Restitution § 1.4, p.17; § 3.7, p. 262 (1978)).

In contrast to this situation described in *Knudson*, Petitioners ask this Court to now hold that the object of **any suit** to enforce the terms of a plan reimbursement provision is "'in essence, to impose personal liability on [Petitioners] for a contractual obligation to pay money . . . '" (Petitioners' Brief, at 23 (*quoting Knudson*, 534 U.S. at 210)), regardless of whether a defendant, as in the present case, was in possession of the particular settlement funds at issue.

Such a result is inconsistent not only with this Court's careful differentiation between money damages and equitable relief in *Knudson*, but also with both ERISA's structure and the objectives by which this Court has stated that interpretations of Section 502(a)(3) should be informed. *See Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996). Plan reimbursement provisions were commonly included in both insured and self-insured health plans at the time of ERISA's enactment as a means of reducing potentially enormous costs to the plan which could adversely affect the cost and availability of coverage to its participants. It cannot reasonably be concluded that Congress, while explicitly authorizing civil actions to "enforce the terms of [a] plan," and mandating the plan fiduciaries act "in accordance with the documents and instruments governing the

plan,"[4] intended to omit the enforcement of such vital plan reimbursement provisions from ERISA's "comprehensive and reticulated" scheme. *See Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 & 361 n.1 (1980) (noting that ERISA is a "comprehensive and reticulated statute" which provides civil and criminal enforcement).

Interpreting ERISA to exclude such provisions from its enforcement provisions contravenes **every one** of what this Court has called the sometimes "competing congressional purposes" for enacting ERISA in the first place. *See Varity Corp.*, 516 U.S. at 497. Those purposes include the desire to: (1) create incentives for the creation and maintenance of employee benefit plans (*see Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 11 (1987)); (2) "protect plan participants and beneficiaries" (*Boggs v. Boggs*, 520 U.S. 833, 845 (1997) (citation omitted)); (3) ensure the enforcement of the terms of employee benefit plans (*Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1523 (11th Cir. 1987)); and (4) assure uniformity and efficiency in plan administration. *N. Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656-57 (1995).

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[4] ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3); ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

III.
ARGUMENT

A. A Claim To Enforce The Terms Of An Employee Benefit Plan Is Explicitly Authorized By ERISA Section 502(a)(3) So Long As The Remedy Sought Is "Appropriate Equitable Relief"

Petitioners' assertions that any claim to enforce a plan reimbursement provision is not authorized under Section 502(a)(3) because it is in essence a breach of contract claim for money damages, and not equitable relief, is specious.[5] The language of ERISA Section 502(a)(3) explicitly authorizes civil actions by a plan fiduciary (as well as a participant and beneficiary) "to **enforce . . . the terms of [a] plan**" or "to redress such violations" of plan terms.[6] This straightforward grant by Congress of the right of a plan fiduciary to enforce plan terms belies Petitioners' assertions. Indeed, ERISA *obligates* a plan fiduciary to act in accordance with plan terms.[7]

The only relevant limitation in Section 502(a)(3) on an action seeking to enforce the terms of a plan is that the **remedy** or **remedies** sought in connection with such a claim must constitute "appropriate equitable relief." Refusing to

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[5] *See* Petitioners' Brief, at 23 (*citing Knudson*, 534 U.S. at 210).

[6] *See* ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (emphasis added).

[7] *See* ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

enforce the terms of an employee benefit plan or allow redress for its violation under Section 502(a)(3) solely because such claim is gratuitously characterized as "in substance" a breach of contract claim for money damages renders the relevant language from Section 502(a)(3) completely superfluous. *See, e.g., Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan v. Willard*, 393 F.3d 1119, 1125 (10th Cir. 2004) (explaining that "[a]fter all, any equitable relief, including those forms explicated by the [Supreme] Court as available under [Section] 502(a)(3), must involve the direct or indirect transfer of money, **and we cannot read the statute to proscribe all forms of relief.**") (emphasis added).

B. The Relief Sought In This Case Constitutes Equitable Relief Within The Meaning Of ERISA Section 502(a)(3)

Respondent's brief amply demonstrates that the relief sought in this case clearly falls within the guidelines for determining "equitable relief" set forth by this Court in *Knudson* and the authorities relied upon by the Court in articulating such guidelines. Thus, despite acknowledging the "fairness" of enforcing plan reimbursement provisions in circumstances like these in this case,[8] Petitioners would ascribe to Congress (without a scintilla of legislative history) an intent to preclude the enforcement of such important employee benefit plan provisions under precisely the circumstances that

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[8] Petitioners' Brief, at 21.

this Court has stated gives rise to a basis for seeking equitable restitution.

To deny such relief where the settlement funds are in defendant's possession and undoubtedly belong "in good conscience to respondent" is to interpret the term "equitable relief" without regard to the primary objectives of ERISA and in a fashion which disregards a reasonable interpretation of the language of ERISA Section 502(a)(3) according to guideposts carefully articulated by the majority in *Knudson*. Following Petitioners' path would turn innumerable cases involving the interpretation of "appropriate equitable relief" into precisely the immersion into the esoteric pronouncements of relevant treatises and ancient cases that both the majority and minority in *Knudson* hoped to avoid.

C. The Equitable Relief Which Respondent Seeks Is "Appropriate" Within The Meaning Of ERISA Section 502(a)(3)

Petitioners assert that, even if the relief which Respondent seeks is "equitable relief" within the meaning of ERISA Section 502(a)(3), it nevertheless is not "appropriate."[9] Such an assertion is inconsistent with this Court's guidelines for interpreting that term set forth in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), and with ERISA's primary policy objectives which are an important touchstone in determining whether particular relief is "appropriate." *Id.* at 515 ("We should expect that courts, in fashioning 'appropriate' equitable relief, will keep in mind the 'special nature and purpose of

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[9] Petitioners' Brief, at 30-35.

employee benefit plans,' and will respect the 'policy choices reflected in the inclusion of certain remedies and the exclusion of others.'" (*quoting Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)).

1. Petitioners' interpretation of ERISA Section 502(a)(3) would essentially preclude the enforcement of any plan reimbursement provision, or any other plan provision which entails an obligation to pay money to a plan.

An affirmance in this case would, effectively, eliminate the right and ability to enforce under ERISA any plan reimbursement provision.[10] Reimbursement provisions, such as those at issue in this case, prevent the dissipation of a limited pool of health care funds that would lead to increases in health benefit plan costs, discourage employers from maintaining health benefit plans, and inevitably increase the ranks of the uninsured.

Functionally, reimbursement provisions operate to allow insurance companies and health benefit plans to recoup funds directly from participants or beneficiaries who ultimately recover

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[10] The same reasoning could be used to foreclose plan fiduciaries from recouping *overpaid* health and pension plan benefits. *See N. Am. Coal Corp. v. Roth*, 395 F.3d 916, 917 (8th Cir. 2005) (district court may properly award equitable relief to plan and its administrator who brought lawsuit against individuals who refused to return monies mistakenly overpaid from pension benefit plan), *cert. denied*, 126 S. Ct. 145 (2005).

payments for the same injuries from responsible third parties. Reimbursement differs from the more costly and burdensome alternative of subrogation in that under a reimbursement provision, a health benefit plan does not actually commence an action in the beneficiary's name, as it would under a subrogation provision, but instead acts as a first lienholder upon any third-party funds collected by the beneficiary.

A primary objective of ERISA is to ensure the enforcement of terms of a plan. *See, e.g., Arnold*, 809 F.2d at 1523 ("The purpose essential to section 1132(a)(3)(B) is to enforce the terms of [a] plan . . . ."). Such an objective is manifest in the structure of ERISA which, among other things (i) requires fiduciaries to act in accordance with the terms of a plan,[11] (ii) provides plan participants and beneficiaries with a cause of action to enforce their "rights under the terms of the plan,"[12] and (iii) authorizes participants, beneficiaries, and fiduciaries "to enjoin any act or practice which violates . . . the terms of [a] plan" or "to obtain other appropriate equitable relief . . . to redress such violations."[13]

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11 ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

12 ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

13 ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

2. The type of relief sought in this case promotes the availability and affordability of health insurance.

Not only does the Petitioners' interpretation undermine the enforcement of a critically important plan provision, but it contravenes the intent of Congress that ERISA be used to protect plan participants and beneficiaries[14] and create incentives for the creation and maintenance of employee benefit plans.[15]

Employer-based health insurance is the keystone of the American health care system. In 2003, approximately 131 million people in the United States had some kind of private health coverage through ERISA-governed group health plans.[16] As the number of privately insured individuals decreases, the financial burden of health

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[14] *See Boggs*, 520 U.S. at 845 ("The principal object of the statute is to protect plan participants and beneficiaries.") (*citing Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)). ERISA itself notes that the express purpose is "to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries." ERISA § 2(b), 29 U.S.C. § 1001(b).

[15] *See Coyne*, 482 U.S. at 11 (1987) ("A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.").

[16] Department of Labor Deputy Assistant Secretary for Policy Bradford P. Campbell, Testimony Before the Subcommittee on Labor, Health and Human Services, and Education Committee on Appropriations, April 2, 2004, *available at* http://www.dol.gov/ebsa/newsroom/ty040204.html.

care is shifted to the already-strained federal and state systems.[17] National public policy is clearly against altering the health insurance and ERISA plan industry in any way that would significantly increase premium rates and deductibles.[18]

Insurance companies and employee health care plans base their rates and benefit levels on actuarial predictions of future claims and expense levels which are based, in part, on past claims experience. Reimbursement and subrogation results

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[17] *See* John Sheils & Lisa Alecxih, The Lewin Group, Inc., *Recent Trends in Employer Health Insurance Coverage and Benefits*, Final Report, 7 (Oct. 21, 1996) (projecting that as the percentage of people with employer-sponsored health care as their primary health care coverage decreases, the percentage of people with Medicare or Medicaid as their primary source of health care coverage will increase), *available at* http://www.lewin.com/Lewin_Publications/Uninsured_And_Safety_Net/Publications-23.htm. *See also* U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States. 2004*, Current Population Reports (August 2005) (the percentage and number of people covered by government health insurance programs increased between 2003 and 2004, while the percentage of people covered by employment-based health insurance decreased).

[18] While the rate of increase has slowed recently, premiums for employer-sponsored health insurance still increased by 9.2% in 2005. Kaiser Family Foundation & Health Research and Educational Trust, *Employer Health Benefits 2005 Annual Survey*, *available at* http://www.kff.org/insurance/7315/index.cfm.

are factored into claims experience.[19] With the inability to recoup plan funds, the inevitable result will be that rates will ultimately increase or benefits will decrease for all members of employee health benefit plans, or in some cases benefits will be discontinued entirely. The impact of the loss of the ability to enforce reimbursement provisions may be particularly harsh for smaller plans, where a single, unreimburseable loss could lead to a significant rate increase for a plan because of the size of the loss relative to the plan's aggregate claims experience.[20]

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[19] *See, e.g., Incurred Health and Disability Claims*, Actuarial Standard of Practice No. 5, § 3.3.5 (Actuarial Standards Bd. 2000), which states:

> Coordination of Benefits (COB) or Subrogation - The actuary should take into account the relevant organizational practices and regulatory requirements related to COB or subrogation. In particular, the actuary should consider how these items are reflected in the data (for example, negative claims or income) and make appropriate adjustments for COB, subrogation, or other adjustments or recovery.

See also Documentation in Health Benefit Plan Ratemaking, Actuarial Standard of Practice No. 31, § 3.5.4 (Actuarial Standards Bd. 1997).

[20] A simple mathematical example confirms this:

Assume a group with $4M of claims in 2005 is renewing their contract with the same plan and population. Assuming further a 10% increase due to changes in cost and utilization, a 3% increase for the aging of the population, and no reduction in claims in the past for recoupment, then the expected claims for 2006 might be calculated as $4.52M, a 13% increase. For insured plans, premiums would be based on this expected claims number.

Even a one percent increase in health plan costs nationally "results in a potential loss of insurance coverage for about 315,000 individuals" over a five-year period.[21] Thus, as reported in the New York Times on August 31, 2005, a new survey by the U.S. Census Bureau shows that, after four years of rapidly rising health costs, the percentage of people receiving health care from employers decreased from 63.6% in 2000 to 59.8% last year (2004).[22] Cost containment mechanisms such as reimbursement provisions are critical to ensure that the number of privately insured individuals does not further decrease.[23]

Petitioners appear to recognize that a subrogation claim brought directly by a plan or insurer against a third-party tortfeasor would constitute "equitable relief" within the meaning of

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However, if during the prior year the group had a $200K net recoupment recovery then the actuary would reduce the prior year's claims experience to $3 8M. Applying the 13% increase to this experience results in an expected claims number of $4.29M. This is approximately 5% less than the projected claims without allowing recoupment.

[21] *See* Health Econ. Practice, Barents Group, LLC, *Impacts of Four Legislative Provisions on Managed Care Consumers*: 1999-2003, iii (prepared for the Am. Ass'n of Health Plans, 1998).

[22] *See* David Leonhardt, *Poverty in U.S. Grew in 2004, While Income Failed to Rise for 5th Straight Year*, N.Y. Times, August 31, 2005, at A9.

[23] *See Relationship Between Health Care Costs and America's Uninsured: Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Educ. & the Workforce*, 106th Cong. 63 (statement of Dan Crippen, Director, Congressional Budget Office).

Section 502(a)(3).[24] Such an approach, however, is far more administratively complex, costly, and unpredictable than the relatively simple enforcement of a reimbursement provision. Indeed, for that reason many plans contain only reimbursement provisions. The legal costs alone incurred by a plan or insurer in pursuing an action against the third-party tortfeasor often can exceed the amount which the plan or insurer is seeking to recover as reimbursement for the benefits which it paid.

Thus, in the present case, where the amount at issue is approximately $75,000, a direct suit against the tortfeasor probably would not have been cost effective. Moreover, again as demonstrated by the facts in this case, the plan participant or beneficiary often fails to cooperate with the plan or insurer with respect to the latter's participation and often (if not usually) may arrive at a settlement with a tortfeasor before the plan or insurer is made aware that the participant or beneficiary is seeking recovery from a third party. Most significantly, it is inconceivable that Congress could have intended, as Petitioners argue, to authorize a subrogation action, but not one for reimbursement, because of purportedly different treatment of those actions under antiquarian equity principles.

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[24] *See* Petitioners' Brief, at 28-30.

3. Petitioners' assertion that reimbursement provisions undermine the protection of beneficiaries is without merit.

Petitioners argue that "[i]t strains credulity to suggest that [the enforcement of a plan reimbursement provision] is 'appropriate[]'" because such enforcement might result in making the plan or its insurer "whole at the expense of [an injured] beneficiary who is left 'in part.'" Petitioners' Brief, at 34 (*citing and quoting* Rodger M. Baron, *Public Policy Considerations Warranting Denial Of Reimbursement to ERISA Plans: It's Time to Recognize The Elephant In The Courtroom,* 55 Mercer L. Rev. 595, 631 (2004)). This assertion, based upon an article which itself relies primarily on conjecture and anecdotal comment rather than empirical evidence, ignores several fundamental facts which render such an assertion untenable.

First, the Petitioners' argument is based only upon the perspective of an injured participant or beneficiary, as distinguished from the perspective of what is in the best interest for a plan's participants and beneficiaries as a whole, including the injured participant. ERISA, however, requires plan fiduciaries to discharge their "duties with respect to a plan solely in the interest of the participants and beneficiaries,"[25] and to "act to ensure that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and

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[25] ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

beneficiaries." *Cent. States, Southeast & Southwest Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 571 (1985). The statute's deliberate use of the plural reflects that the interests of those plan members in the aggregate are paramount, and one member should not be allowed to benefit disproportionately at the expense of the group. *See Ellis v. Metro. Life Ins. Co.*, 126 F.3d 228, 234 (4th Cir. 1997) (a fiduciary "must serve the best interests of all Plan beneficiaries, not just the best interest of one potential beneficiary"). Yet Petitioners completely disregard that a failure of the plan or its insurer to recover benefits paid to an injured beneficiary or participant out of a judgment against or a settlement from the tortfeasor responsible for the injury may increase the plan's insurance premiums and/or uninsured costs to the detriment of **all** of its participants and beneficiaries.

Second, reimbursement provisions eliminate double payment for the same claim, as well as ensure that the liability for tort claims falls only on those who cause injury rather than innocent plan participants, beneficiaries, or their health plans. *See Health Cost Controls of Ill., Inc. v. Washington*, 187 F.3d 703, 711-12 (7th Cir. 1999) (noting that "[t]he obvious purpose of [an ERISA plan's document's reimbursement provision] is to prevent double payment for the same claim"), *cert. denied*, 528 U.S. 1136 (2000). Barring enforcement of a plan reimbursement provision allows unjust enrichment of one participant or beneficiary at the expense of all other participants.

Third, Petitioners ignore the well-recognized fact that in enacting ERISA, Congress intended to leave to the discretion of plan sponsors the design, benefits, benefit exclusions, and other terms of employer benefit welfare plans. *Land v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Health & Welfare Fund*, 25 F.3d 509, 514 (7th Cir. 1994) ("This court similarly has observed that 'Congress never intended ERISA to dictate the *content* of welfare benefit plans' and that decisions as to the content are within the discretion of the plan administrators") (citation omitted); *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075, 1078 (4th Cir. 1989) ("'Congress left employers much discretion in designing their plans' under ERISA and in determining the level and conditions of benefits.") (*quoting Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283 (3d Cir. 1988)), *cert. denied*, 493 U.S. 919 (1989). Thus, nothing in ERISA prevents a plan sponsor from including the type of reimbursement provisions at issue, or even conditioning the advance payment of benefits to someone injured by a third party on the presence of an enforceable reimbursement agreement. *Kress v. Food Employers Labor Relations Ass'n*, 391 F.3d 563, 569-70 (4th Cir. 2004).

No legal mandate requires employers to sponsor benefit plans, nor is there any mandate regarding "what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (citations omitted). To the contrary, the Court has recognized that in enacting ERISA, Congress did not intend that the federal judiciary, as Petitioners

would have it, substitute its views as to what constitutes appropriate plan design for the judgments of employers and plan sponsors. *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 831-34 (2003); *Pegram v. Herdrich*, 530 U.S. 211, 232-34 (2000); *see also Dzinglski*, 875 F.2d at 1078 ("The judicial role is not to rewrite [ERISA] plan provisions, but to assure that they are fairly administered."). Instead, this Court has been adamant that ERISA not be interpreted in a manner which "unduly discourage[s] employers from offering welfare benefit plans in the first place." *Varity Corp.*, 516 U.S. at 497 (citations omitted). Petitioners' argument in this case, by failing to give effect to a critical cost-saving provision of most health and welfare plans, unfortunately does just that.

4. Rejection of enforcement of ERISA reimbursement claims would adversely affect the uniform administration of employee benefit health plans.

Another important objective of ERISA is to assure uniformity in plan administration. *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001) ("One of the principal goals of ERISA is to enable employers 'to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.'") (*quoting Coyne*, 482 U.S. at 9). *See also Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002) ("ERISA's [basic] policy [is to] induc[e] employers to offer benefits by assuring a predicable

set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred.") (citation omitted); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) ("The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans."). This goal, too, would be undermined by the adoption of Petitioners' arguments. Petitioners sought review of the present case by this Court because of a split among federal circuit courts in interpreting and applying its holding in *Knudson*. The adoption of Petitioners' position in this case almost certainly will not dispositively resolve the detrimental effects of this conflict, but rather will compound them.

Although derived from what the majority in *Knudson* admitted was an "antiquarian inquiry," the distinction which it articulated between legal and equitable relief clearly captured the essence of that distinction as set forth by the sources on which the majority relied. Petitioners, on the other hand, urge this Court to go beyond that distinction in a never-ending search for more esoteric and less universal distinctions to achieve the result which they seek in this case. Given the complexity of such an exercise, it is reasonable to expect that the lower courts will proceed in multiple, inconsistent directions, if they are required to disregard the clear *Knudson* guideposts.

Nor, finally, is it satisfactory to assume that employee benefit plans can effectively enforce these important plan rights in the state courts. No one seriously disputes that the varying and divergent

laws in the states relating to plan reimbursement and subrogation provisions would lead to a patchwork of different results in state courts applying state law. The national, uniform administration of a provision central to most employee benefit plans would be destroyed as a consequence -- making benefits all the more costly to provide, thereby threatening the financial viability of employer-sponsored plans.

IV.
CONCLUSION

For the above reasons, *Amici*, the America's Health Insurance Plans, Inc., the American Benefits Council, and the National Association of Manufacturers, respectfully request that this Court affirm the decision of the Court of Appeals for the Fourth Circuit.

Dated: February 23, 2006

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IN THE

Supreme Court of the United States

JOEL SEREBOFF AND MARLENE SEREBOFF,
Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,
Respondent.

On Writ Of Certiorari to the United States Courts of Appeals for the Fourth Circuit

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Nos. 05-260

IN THE

Supreme Court of the United States

JOEL SEREBOFF AND MARLENE SEREBOFF,
Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,
Respondent.

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONERS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief as *amicus curiae*. The parties have filed blanket letters of consent to the filing of amicus briefs with this Court.[1]

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in personal injury cases and other civil actions.

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

ATLA is concerned that the decision below, and other federal decisions permitting ERISA plans to enforce reimbursement provisions, will have a devastating and unfair impact on many American workers. At a time when an employee is seriously injured, he or she will be subjected to lawsuits by their own health plan for repayment of benefits out of tort recoveries intended to compensate for lost income, future medical expenses, and other losses. Many plans also refuse to pay a fair share of the legal expenses incurred to obtain the tort recovery.

Congress did not authorize reimbursement lawsuits under ERISA, and this Court should resist calls to broadly interpret the statute to allow such harsh enforcement actions.

SUMMARY OF THE ARGUMENT

1. The lower court erred in holding that MAMSI's lawsuit was permissible under §502(a)(3) of ERISA as "other equitable relief." This Court has made clear that §502(a)(3) authorizes only those actions by plan fiduciaries that were typically available in courts of equity. It does not permit actions that essentially seek money damages for breach of contract.

The sole basis for MAMSI's claim is its contract provision calling for reimbursement out of recoveries from third parties. MAMSI's suit fits squarely within the recognized cause of action for legal, rather than equitable, restitution.

The court below erroneously concluded that MAMSI made out an equitable cause of action for return of funds within the Sereboffs' possession. Those funds, however, were never MAMSI's. The proper focus is the amount paid out by MAMSI to the Sereboffs' medical providers. Those funds have been

dissipated, and MAMSI has only a legal cause of action for repayment.

There is no sound reason for this Court to depart from its strict construction of §502(a)(3). Congress omitted such authorization from its carefully crafted and detailed enforcement scheme. Moreover, Congress enacted ERISA to protect employees from abuses and hardships inflicted by those responsible for their benefit plans. In addition, Congress acted against the background of the common law prohibition against subrogation to recover medical benefits. The Court should defer to Congress's responsibility to balance competing interests and determine whether reimbursement lawsuits serve the public good.

2. Reimbursement lawsuits do not serve the public policies claimed by proponents. They do not target "double recoveries" by plan beneficiaries. Most tort plaintiffs, particularly the seriously injured, do not receive full compensation in the tort system. The limits of liability insurance, legal expenses, and other factors result in less than full compensation. Tort reform statutes also result in undercompensation, often for the purpose of shifting part of that burden to first-party insurance, including ERISA plans.

Nor does reimbursement serve to reduce the costs of coverage for participants in ERISA plans. Commercial insurers do not take anticipated reimbursements into account in setting premiums. Though self-funded plans may realize some savings, the reduction in cost for coverage to the typical employee would be miniscule.

More fundamentally, the proposal to impose economic hardship on a few beneficiaries so that the

many might save a small sum is inconsistent with the purpose of ERISA. It is insurance running in reverse.

3. If this Court does determine that ERISA authorizes reimbursement lawsuits, such "equitable relief" should be truly equitable. The Court should follow the lead of the great majority of state courts and hold that, as a matter of federal common law, a plan has no right of subrogation or reimbursement out of a tort recovery until the beneficiary has been made whole. In addition, the Court should make clear that, to prevent unjust enrichment, an ERISA plan reimbursed from a tort recovery must bear a proportionate share of the costs and attorney fees expended to obtain the tort recovery.

ARGUMENT

I. A SUIT BY AN ERISA PLAN TO ENFORCE A PLAN PROVISION TO REIMBURSE THE PLAN OUT OF THE PROCEEDS OF A TORT RECOVERY IS AN ACTION AT LAW, UNAVAILABLE UNDER ERISA.

A. Reimbursement Lawsuits Are Actions for Legal, Not Equitable, Reimbursement.

Following their automobile accident, Joel and Marlene Sereboff, find themselves at the center of a controversy that will determine whether thousands of American workers will receive the medical benefits and security promised by their employer-sponsored health plans. The Sereboffs are

beneficiaries of an ERISA[2] medical benefits plan provided by Mrs. Sereboff's employer and administered by Mid Atlantic Medical Services, Inc. [MAMSI] as fiduciary. After the Sereboffs settled their personal injury action against several alleged tortfeasors, MAMSI brought suit for reimbursement of $74,869.37, paid under the plan for their medical expenses. MAMSI's sole basis for its claim to this amount is a provision in its Plan:

> If you or your dependent receives benefits and have a right to recover damages from a third party, the Company is subrogated to this right. All recoveries from a third party (whether by lawsuit, settlement, or otherwise) must be used to reimburse the Company net of reasonable attorney fees and court costs . . .

MAMSI Plan at 29.

The district court granted summary judgment to the plan, and the Fourth Circuit affirmed, holding that "MAMSI's action seeks equitable restitution, as that term is used in *Knudson*, because MAMSI seeks to recover funds that are specifically identifiable, belong in good conscience to MAMSI, and are within the possession and control of the Sereboffs." 407 F.3d at 218.

This Court in *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204 (2002), emphasized that the civil enforcement actions enumerated by Congress in §502(a)(3) of ERISA are the only actions a plan fiduciary may bring to enforce provisions of the plan. Moreover, the "equitable relief" authorized

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[2] The Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 891, 29 U.S.C. §1001-1461 (2003).

by that section is limited to those actions "typically available at equity." *Id.* at 211. The Court further held that such actions do not include those that are essentially breach of contract actions. *Id.* at 213.

In *Knudson*, the plan could not state a claim for equitable reimbursement because the beneficiaries were not in possession of the funds the plan sought. That the funds in this case are in the Sereboffs' possession does not call for a different outcome. Possession is a necessary, but not sufficient requirement for equitable restitution. MAMSI's action in this case, and indeed reimbursement actions by ERISA plans generally, cannot qualify as "other equitable relief' authorized by ERISA.

1. MAMSI's Claim For Reimbursement of Medical Benefits Is A Cause Of Action Historically Recognized As Legal Restitution.

This Court in *Knudson* characterized lawsuits like MAMSI's as actions for restitution. Justice Scalia, writing for the Court, explained that, in the days of a divided bench, some restitutionary actions were legal, while others were directed to courts sitting in equity. *Id.* at 212-15, citing 1 Dan B. Dobbs, LAW OF REMEDIES §§ 4.2(1) & 4.3(1) (2d ed.1993). He added, "whether [restitution] is legal or equitable depends on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought." 534 U.S. at 213.

As the Fourth Circuit acknowledged, the sole basis for MAMSI's claim that "the disputed funds belong in good conscience to MAMSI" is the Plan's "express, unambiguous reimbursement provisions." 407 F.3d at 218-19. Thus, MAMSI's claim is essentially based on breach of its contract by the

Sereboffs, notwithstanding the plan's attempts to "dance around the word." *Mertens v. Hewitt Associates*, 508 U.S. 248, 255 (1993).

Secondly, "the nature of the underlying remedies sought" places this case squarely on the law side. *Knudson* at 213. As Professor Dobbs explains, restitution at law deals with cases where the plaintiff is entitled to return of his property because (1) he has legal title or (2) he is "able to show just grounds for recovering money [used] to pay for some benefit the defendant had received." Dobbs, §4.2(1) at 571; *see also Knudson*, at 213. MAMSI's cause of action clearly falls within the second category of legal relief.

One of the recognized counts of restitution at law was known as "money had and received." As described by Professor Dobbs,

> When the defendant himself received money that belonged in good conscience to the plaintiff . . . the plaintiff was entitled to restitution of the money, which is said to have been received by the defendant for the use of the plaintiff. The count includes *money paid by a third person* so long as the money in good conscience belongs to the plaintiff.

Dobbs, at §4.2 (emphasis added).

An example is found in *Gaines v. Miller*, 111 U.S. 395 (1884). An estate's agent received money from a third party in exchange for estate property. Despite the agent's obligation under implied contract to pay the funds over to the estate, the agent kept some of the money. Years later Gaines, the legatee of the estate, sued Miller, the administrator of the deceased agent's estate, seeking an equitable

reimbursement. The Court held that the equity court had no jurisdiction over the action.

> It is, therefore, simply a case of money had and received by him for the use of appellant, . . . Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. The remedy at law is adequate and complete.

Id. at 397-98 (citations omitted).

Equitable restitution, by contrast, seeks to divest the defendant of property wrongfully gained. The relief "is measured by the defendant's unjust enrichment, not by the plaintiff's loss." Dobbs, at §4.5(1). In this case, MAMSI seeks repayment of the amount paid by the plan for the Sereboffs' medical treatment, which were not wrongfully obtained nor an unjust enrichment of the Sereboffs. MAMSI's suit is clearly an action at law, and is not authorized by ERISA §502(a)(3).

2. MAMSI's Action Does Not Meet the Requirements of Equitable Restitution.

Justice Scalia in *Knudson*, indicated that "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to *restore to the plaintiff particular funds or property* in the defendant's possession." *Id.* at 213-14 (emphasis added).

The court below erroneously concluded that MAMSI's cause of action met these requirements because it "seeks to recover funds that are specifically identifiable, belong in good conscience to MAMSI, and are within the possession and control of the Sereboffs." 407 F.3d at 218.

The court's error lies in focusing on the tort settlement as the "particular funds or property" to be restored to the plaintiff. MAMSI never owned those funds. Its only claim on them is its plan provision identifying third-party recoveries as the source out of which beneficiaries must repay medical benefits. To hold that this provision makes MAMSI "in the eyes of equity, the true owner" of the settlement, *Knudson* at 213, would enable every breach of contract to pay money to be transformed into an equitable action. Such an interpretation would render Congress's restrictive language in §502(a)(3) meaningless and essentially repeal "the unmistakable limitation of the statute." *Knudson* at 217. *Cf.*, 51 Am. Jur. 2d Liens §29 (1970) (An equitable lien requires "more than a mere expectation, or even an agreement, that a debt will be paid out of a particular fund.").

The proper focus of inquiry should be the $74,869 paid out by MAMSI under the plan. If a constructive trust is to be imposed on money, it must be an identifiable fund traceable to the plaintiff. 1 Dobbs, §4.3(2), at 590. The "idea is that the plaintiff's property has been found in the hands of the defendant and must be restored to the plaintiff, . . . even if the property has undergone a change in form." 2 Dobbs, §6.1(2), at 7-8. *See also United States v. Benitez,* 779 F.2d 135, 140 (2d Cir. 1985) ("It is hornbook law that before a constructive trust may be imposed, a claimant to a wrongdoer's property must trace his own property into a product in the hands of the wrongdoer.").

> In a reimbursement action, however, the only money traceable to the plaintiff is that which has already been dissipated to pay for the policyholder's medical expenses. The third-party recovery, upon which the insurer seeks the trust

> or lien, is not traceable to the insurer; the insurer's only claimed right to that fund is the contract right embodied in the ERISA plan, and this relief is absolutely foreclosed after *Knudson*.

David D. Leishman, *Adding Insult To Injury: ERISA, Knudson, and the Error of the Possession Theory*, 89 Minn. L. Rev. 1214, 1233-34 (2005).

In this case, MAMSI's $74,869 was never in the possession of the Sereboffs; it was paid to medical providers and dissipated. The settlement funds are completely separate property, traceable only to the third-party tortfeasor or its insurer. It was rightfully paid to the Sereboffs as compensation for tortiously inflicted harms, and would have been paid regardless of whether past medical expenses had been paid by MAMSI or by the Sereboffs themselves.

B. This Court Should Not Interpret ERISA To Authorize Plans to Sue Beneficiaries For Reimbursement of Covered Medical Expenses Out of Tort Recoveries.

Amicus anticipates that Respondent and supporting amici will urge this Court to depart from its prior construction of §502(a)(3) and expansively interpret that section to allow reimbursement actions. Amicus urges the Court to reaffirm its position in *Knudson*, hewing close to the statutory text and deferring to Congress's responsibility to determine whether allowing lawsuits by fiduciaries against beneficiaries strikes the appropriate balance among competing interests and serves the public good.

ERISA's text and history strongly indicates that Congress did not intend to grant fiduciaries this authority.

First, Congress in providing civil enforcement remedies for plan fiduciaries under ERISA, made no provision for subrogation or reimbursement, as it has in other statutes.[3] In fact, in §502(a)(1)(B), Congress authorized actions to enforce provisions of benefit plans, but strictly limited such actions to beneficiaries and participants, excluding plan fiduciaries.

This Court has justifiably refused to interpret ERISA's civil enforcement provisions broadly. The Court has recognized that ERISA's "carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Knudson*, at 209, quoting *Mertens, supra*, at 254. For this reason, the Court has stated its "unwillingness to infer causes of action in the ERISA context." *Mertens*, at 254 (1993).

Secondly, Congress enacted ERISA to protect workers who had been deprived of expected benefits by those responsible for their benefit plans. The saga of ERISA began in 1963, when financially troubled automaker Studebaker defaulted on its pension plan, frustrating the expectations of thousands of workers and retirees. *See* James A. Wooten, *"The Most Glorious Story of Failure in the Business": The*

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[3] See, e.g., 42 U.S.C. §2651-2653 (authorizing the Veterans Administration under the Medical Care Recovery Act to recover benefits from beneficiaries who have obtained tort recoveries); 42 U.S.C. § 1395y (providing for reimbursement to the Social Security Administration).

Studebaker-Packard Corporation and the Origins of ERISA, 49 Buff. L. Rev. 683 (2001). Other scandals followed in which workers found that the benefits they had counted on were not there. *See generally*, Michael S. Gordon, Overview: Why Was ERISA Enacted?, in U.S. Senate Special Comm. on Aging, 98th Cong., The Employee Retirement Income Security Act of 1974: The First Decade 6-24 (Comm. Print 1984).

Following "a decade of congressional study of the Nation's private employee benefit system," *Knudson* at 209, Congress enacted ERISA to address "the absolute need that safeguards for plan participants be sufficiently adequate and effective to prevent the numerous inequities to workers under plans which have resulted in tragic hardship to so many." H.R. Rep. No. 93-533, at 9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647.

In view of this history, it is unlikely that Congress intended the phrase "other equitable relief" to hand fiduciaries a blank check, allowing them to write their own law by authorizing enforcement of any provisions they choose to incorporate into a plan's provisions.

Thirdly, Congress enacted ERISA against the background of a long common law history that prohibited subrogation actions by an insurer to recover medical expenses. Although such actions were permissible in property damage cases, subrogation rights to covered medical expenses caused by a tortfeasor "had been disallowed by virtually all courts until recently." Roger M. Baron, *Subrogation: A Pandora's Box Awaiting Closure*, 41 S.D.L. Rev. 237, 239-40 (1996).

During the 1960s, insurers found they could avoid that prohibition by rewriting subrogation clauses to call for "reimbursement." Roger M. Baron, *Public Policy Considerations Warranting Denial of Reimbursement to ERISA Plans: It's Time to Recognize the Elephant in the Courtroom*, 55 Mercer L. Rev. 595, 603 (2004). During the period that Congress was working on ERISA, "it is doubtful that the matter of reimbursement was even in existence as an insurance lexicon. Certainly, the idea of reimbursement had yet to be presented or approved by the courts." *Id.* at 617-18. In one of the first reported decisions to address reimbursement provisions, one state court judge decried the "creeping erosion of the anti-subrogation principle." *Lee v. State Farm Mutual Automobile Ins. Co.*, 129 Cal. Rptr. 271, 278 (Ct. App. 1976) (Freidman, J., concurring).

The controversy has not abated.

> Some jurisdictions have never permitted subrogation or reimbursement for medical expense claims. Even today, some jurisdictions, which initially decided to permit subrogation on medical expense claims, have since reconsidered the appropriateness of doing so. These jurisdictions have come to conclude, either by judicial decision or by statute, that subrogation and reimbursement on medical expense claims is inappropriate and should not be allowed.

Baron, 55 Mercer L. Rev. at 603. *See, e.g.*, *Pennsylvania Gen. Ins. Co. v. Austin Powder Co.*, 502 N.E.2d 982, 983 (N.Y. 1986) ("An insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered."); *see also Allstate Ins. Co. v. Reitler*, 628 P.2d 667, 670 (Mont. 1981), and *Maxwell*

v. Allstate Ins. Cos., 728 P.2d 812, 815 (Nev. 1986), both holding plan provisions requiring reimbursement of medical payments void as a matter of public policy). Several states have acted legislatively, adopting anti subrogation statutes. *See, e.g.*, Okla. Stat. Ann. tit. 36, §6092 (West 2001); 75 Pa. Cons. Stat. Ann. §1720 (West 2001).

Among those states that permit subrogation or reimbursement, the great majority allow reimbursement only after the injured insured or beneficiary has been made whole. *See* Part III, *infra*.

It is unlikely Congress would have intended to authorize fiduciaries to institute actions that were historically prohibited at common law and which are so antithetical to public policy that the overwhelming majority of states either ban such actions or permit them only after the insured has been made whole. Certainly Congress would not have taken such a drastic step without discussion or by using the opaque phrase "appropriate equitable relief."

Finally, it is the responsibility of Congress to determine whether reimbursement suits are in the public interest and, if so, to amend the statute. Indeed, legislation passed by the House on Dec. 15, 2005, would amend §502(a)(3) to authorize "an action by a fiduciary . . . enforcing terms of the plan that provide a right of recovery by reimbursement or subrogation." Pension Protection Act of 2005, H.R. 2830, 109th Cong., §307 (2005).

Amicus suggests that in this area, it is most appropriate for the Court to resist calls for a distorted and expansive interpretation of the statutory text and allow Congress to carry out its responsibility to "resolve[] innumerable disputes

between powerful competing interests – not all in favor of potential plaintiffs." *Knudson*, at 209.

II. UNRESTRICTED REIMBURSEMENT OF ERISA PLANS OUT OF THE BENEFICIARY'S TORT RECOVERY DOES NOT SERVE PUBLIC POLICY AND UNDERMINES THE PURPOSES OF ERISA.

Insurance companies and health plans justify reimbursement as eliminating a "double recovery," merely depriving the beneficiary of a "windfall." *See e.g.*, Brief of Amici Curiae the American Associations of Health Plans, et al. at 16, Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) (No. 99-1786). Additionally, reimbursement is often portrayed as "cost-containment," without which the cost for all beneficiaries must necessarily increase. *Id. See also* Brief of Amicus Curiae Self-Insurance Institute of America, Inc., at 6-9, *Knudson* (No. 99-1786). Neither argument has any factual basis.

A. Reimbursement Does Not Prevent "Double-Recovery." But Deprives Beneficiaries of Legal Redress and Compensation for Their Injuries.

At the outset, Amicus submits that the term "double recovery" in this context is particularly inapt. It indicates the beneficiary was entitled to only one recovery, but obtained two. Even where an individual's tort recovery fully compensates for his or her losses, "[p]recluding the subrogation of the insurer does not result in a double recovery for the insured because the insured is merely receiving the benefits for which he has already paid. Allowing subrogation . . . results in a windfall recovery for the

insurer." *Maxwell v. Allstate Ins. Cos.*, 728 P.2d 812, 815 (Nev. 1986); *see also, Allstate Ins. Co. v. Reitler*, 628 P.2d 667, 670 (Mont. 1981) (similar); *Allstate Ins. Co. v. Druke*, 576 P.2d 489, 492 (Ariz. 1978) (similar).

In most cases, however, injured plaintiffs, especially those suffering serious injury, do *not* recover for all their losses from the tortfeasor. A verdict or settlement in a personal injury case represents the sum of the plaintiff's various proven compensable damages. These might include past medical expenses, future medical care, rehabilitative expenses, past lost income, lost earning capacity for the future, physical pain and suffering, and property damage. In the appropriate case, a claimant might also be entitled to the costs of job retraining, or modifying his or her home to accommodate a disability.

Yet, "scholarly research documents that more seriously injured victims tend to recover only a part of their total financial losses, notwithstanding the supposed legal entitlement to full compensation." Kenneth S. Abraham, Robert L. Rabin, Paul C. Weiler, *Enterprise Responsibility For Personal Injury: Further Reflections*, 30 San Diego L. Rev. 333, 340 (1993). The most seriously injured plaintiffs tend to be the most undercompensated. "In fact, the consistent undercompensation [of personal injury plaintiffs] at the higher end is so well replicated that it qualifies as one of the major empirical phenomena of tort litigation." Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System – And Why Not?* 140 U. Pa. L. Rev. 1147, 1218 (1992).

To permit an ERISA plan to take its reimbursement for medical expenses out of funds intended to compensate other losses does not divest the injured beneficiary of a double recovery. It deprives that person of the single legal redress to which he or she is entitled under state law.

The vast majority of tort actions end in settlement, and the settlement amount is very likely to be less than full compensation for the plaintiff's losses. Often the defendant's available liability insurance is insufficient. A plaintiff may also agree to settle for a lower recovery to avoid the delay and cost of pursuing the case to a verdict, as well as the uncertainty of prevailing at trial or on appeal. In addition, or rather subtraction, attorney fees and litigation expenses reduce aplaintiff's net recovery.

Consequently, even large tort awards for serious injury seldom represent a "windfall."

> The sad fact in the vast majority of these critical injury cases is that the insured is left not only seriously impaired for life, but, if reimbursement is permitted, the insured is also left financially destitute.

Baron, *supra,* 55 Mercer L. Rev. at 597.

Examples of the potentially devastating effects of reimbursement are legion, including some that are well known to this Court. In *Knudson*, Janette Knudson was rendered quadriplegic in a car crash. The ERISA plan paid $411,157 of her medical expenses. (Most of this expense was paid by Great West, a commercial insurer, insurance company pursuant to its "stop-loss" agreement with the plan). Her suit against several tortfeasors proceeded to settlement. After deducting attorney fees, costs, and repayment of Medicaid, the California court

allocated $256,745 to a Special Needs Trust to provide for Janette's continuing medical care; and designated $13,828 as compensation for past medical expenses. *Great-West Life & Annuity Ins. Co. v. Knudson*, 2000 WL 145374 (9th Cir. 2000) (unpublished) at *1. A check for that amount was sent to Great West. The company rejected the payment and sued Knudson to capture the entire amount in the Special Needs Trust as reimbursement. *Id.*

If this Court had not denied reimbursement, Janet Knudson would have been left with nothing to pay for her care for the rest of her life, despite both the legal redress she had obtained from the tortfeasor for this purpose and despite the payments accepted by the plan to provide her medical coverage.

Also familiar to this Court is the plight of the beneficiary in *FMC Corp. v. Holliday*, 498 U.S. 52 (1990). Fifteen-year-old Cynthia Holliday was severely and permanently injured in an automobile accident. Her medical expenses exceeded $178,000 and she faced future medical expenses. *FMC Corp. v. Holliday*, 885 F.2d 79, 80 (3d Cir. 1989). FMC's self-funded medical plan, in which Cynthia's father was an employee participant, paid a portion of her medical expenses. 498 U.S. at 54. Holliday and others injured in the accident brought a negligence action against the driver. The suit was settled for the driver's liability policy limits, and Holliday's share of the settlement was $49,825. The plan sued Cynthia for reimbursement, seeking the entire settlement amount, leaving her with nothing to pay for medical expenses that were not covered or the care she would need in the future. This Court held that Pennsylvania's anti-subrogation statute, which was

enacted to prevent this kind of harsh result, was preempted by ERISA. 498 U.S. at 65.

In the lower federal courts, ERISA plans have demanded reimbursement under provisions like MAMSI's, with little regard to the devastating impact on their own beneficiaries. An example is *In re Paris*, 44 F. Supp. 2d 747 (D. Md. 1999), aff'd, .211 F.3d 1265, 2000 WL 384036 (4th Cir. 2000) (unpublished). Shawn Paris, twenty-four years old, was severely injured and suffered permanent brain damage when his motorcycle was hit by a negligent driver. He was a participant in the Iron Workers' Trust Fund, whose ERISA plan covered medical treatment costing over $100,000. Paris' lawsuit against the driver was settled for $100,000. The plan, like MAMSI's, required that *any* amounts recovered from a third party be used to reimburse the plan. The district court held, and the Fourth Circuit affirmed, that the plan's subrogation provision must be enforced according to its terms. Consequently, the plan was entitled to the entire settlement.

The Fourth Circuit acknowledged "the possible hardships when an accident victim must reimburse a plan even when not made whole." 2000 WL 384036 at *3. Nevertheless, Shawn's mother and legal guardian was left with nothing to care for her brain damaged son for the remaining 51 years of his expected life. Adding insult to injury, the court rejected her request that the plan at least pay its share of the costs and attorney fees expended to create the settlement fund in the first place. *Id.*

These and many other examples make clear that the overriding issue does not concern "windfalls," which seldom occur. Rather, the question

is: Who shall bear the risk that a tort recovery will not be sufficient to make the plaintiff whole for his or her injuries?

Amicus submits that the medical benefits plan, which has accepted payment for coverage of the beneficiary's medical expenses and is in the business of spreading the costs of medical expenses, is the appropriate party to bear that risk. To permit the plan to grant itself first priority and take its repayment in full before the injured beneficiary's other losses are compensated cannot be deemed equitable and is not consistent with Congress's purpose of fostering coverage under employee benefit plans.

B. Reimbursement Imposes the Costs of State Tort Reform Laws On Innocent Victims, Undermining Both State and Federal Policy.

Another reason many plaintiffs recover less than full compensation for wrongful injury is found in tort reform legislation enacted in most states. These statutes vary greatly in their scope and effect. However, a common objective is to shield the tortfeasor from the obligation to fully compensate the injured plaintiff, in the hope of reducing the cost of liability insurance premiums. Supporters frequently state that full compensation of accident victims through the tort system is expensive and inefficient and would be better accomplished by first-party insurance, with its lower transaction costs. *See* Victor E. Schwartz, *Tort Law Reform: Strict Liability and the Collateral Source Rule Do Not Mix,* 39 Vand. L. Rev. 569, 574 (1986). *See also* George L. Priest, *The Current Insurance Crisis and Modern Tort Law,* 96 Yale L.J. 1521, 1550-63 (1987), a highly

influential work, arguing that a shift from first-party insurance to third party liability insurance was the root cause of the insurance crisis of the mid-1980s.

Most states, for example, have abolished or greatly restricted the collateral source rule. The common law rule required a tortfeasor to compensate a prevailing plaintiff for medical expenses resulting from wrongful injury, regardless of whether those expenses were covered by the plaintiff's health plan or insurer. Restatement (Second) of Torts § 920A(2) (1979). *See generally,* Richard C. Maxwell, *The Collateral Source Rule in the American Law of Damages,* 46 Minn. L. Rev. 669 (1962).

Most states have eliminated this rule to some extent.[4] Some statutes are applicable in all personal injury cases, while others affect specific tort actions. *E.g.,* Cal. Civ. Code § 3333.1 (medical malpractice). Some admit evidence of collateral source payments for the jury's consideration in determining damages. *E.g.,* Colo. Rev. Stat. § 13-21-111.6. Others require the court to deduct such amounts from the verdict before entering judgment. *E.g.,* 40 Pa. Cons. Stat. Ann. § 1303.508 (West Supp. 2004).

Many of these statutes were enacted in response to the recommendation by a federal inter-agency working group, which concluded that "elimination of subrogation (that is, simply offsetting all collateral sources against the award, and prohibiting subrogation arrangements) may have a limited effect and be justified on the basis of

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[4] The American Tort Reform Association, which tracks such legislation, reports that 36 states have restricted the collateral source rule. See http://www.atra.org/issues/index.php?issue=7344

significant reductions in transaction costs." U.S. Dep't of Justice, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 71 (1986).[5] *See Perreira v. Rediger*, 778 A.2d 429, 434 (N.J. 2001) (noting the influence of the Working Group's recommendation on state enactments.).

For example, New Jersey's statute requires that in all personal injury actions the trial judge shall deduct from the award any portion of the damages that was covered by health insurance. N.J. Stat. Ann. §2A:15-97 (2000). The legislature's intent was "to shift the burden, at least to some extent, from the liability and casualty insurance industry to health and disability third-party payers." *Perreira, supra,* at 436, quoting *Lusby v. Hitchner*, 642 A.2d 1055, 1061 (N.J. Super. 1994).

In such circumstances, a plaintiff's personal injury award contains no double recovery or unjust enrichment. An ERISA plan certainly has no equitable or moral entitlement to funds that the legislature has decided should be credited to the tortfeasor precisely so that the burden would be shouldered by health plans.

This Court should not depart from its close reading of §502(a)(3) in *Knudson* and indulge in an

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[5] *See also*, 2 American Law Inst., REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 182 (1991) (In a thorough examination of the tort system, the ALI states that, for its recommendation to abolish the collateral source rule to make economic sense, "there must be a bar to any subrogation or reimbursement rights exercised by loss insurers against the tort award.").

expansive interpretation that undermines the efforts of the states to regulate and balance the obligations of both liability and health insurance.

Damage caps may also result in less than full compensation in personal injury actions. Most states place a ceiling on noneconomic damages in certain cases.[6] Six states impose caps on economic damages, including past and future medical expenses, in medical malpractice cases.[7] The impact of damage caps falls most heavily on seriously injured individuals. To allow ERISA plans to repay themselves out of already-inadequate tort recoveries unfairly increases the hardship for those who can least afford to subsidize both the liability insurance industry and employee medical plans.

Most states have also enacted legislation to modify the doctrine of joint and several liability, under which each joint tortfeasor is answerable for all the harms caused.[8] Tort reform statutes typically limit liability to the tortfeasor's percentage of fault. Thus a defendant found to be 33% at fault can be required to pay only 33% of the plaintiff's damages. Yet the typical ERISA reimbursement provision, like MAMSI's, asserts a right to 100% repayment up to the amount of the tort recovery.

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[6] *See* http://www.atra.org/issues/index.php?issue=7340

[7] *E.g.*, Va. Code Ann. § 8.01-581.15 (Michie Supp. 2004). *See generally*, Catherine M. Sharkey *Unintended Consequences Of Medical Malpractice Damages Caps*, 80 N.Y.U.L. Rev. 391 (2005).

[8] *See* http://www.atra.org/issues/index.php?issue=7345 (listing 44 states).

Allowing medical plans unfettered authority to recapture paid benefits out of tort recoveries eliminates the ability of employees to protect themselves against the shortcomings of the tort system through first-party coverage at work. This devalues ERISA coverage and undermines Congress's purpose of fostering employer-sponsored benefit coverage.

Moreover, beneficiaries and their families who are left without resources to obtain needed medical care must necessarily look to Medicaid. This surely undermines Congress's intent that Medicaid serve as "the payer of last resort," not as a subsidy for private medical plans. S. Rep. No. 99-146 at 279 (1985), *reprinted in* 1986 U.S.C.C.A.N. 42, 312.

C. Reimbursement Does Not Significantly Reduce the Cost of Coverage for Plan Participants.

A second policy argument advanced in favor of enforcing subrogation provisions is that the income received from reimbursement serves to reduce the costs that must be borne by all plan participants. Without the ability to enforce such provisions, the industry contends, the costs paid by all plan participants must necessarily increase. Brief of Amicus Curiae Self-Insurance Institute of America, *supra,* at 8-9; Brief of Amicus Curiae Central States, Southeast and Southwest Area Health and Welfare Fund at 2, *Knudson* (No. 99-1786).

The insurance industry has consistently failed to demonstrate that, in fact, such recoupment lowers premiums or costs to insureds by any significant amount. *See* Edwin W. Patterson, ESSENTIALS OF INSURANCE LAW §33, at 151 (2d ed. 1957) ("Subrogation is a windfall to the insurer. It plays no

part in the rate schedules (or only a minor one)."). As one authority states,

> The prospect of a successful subrogation collection is not a factor in the insurer's rate determination. In fact, the conjectural and remote nature of subrogation militates against its inclusion as a factor for consideration in the setting of premium rates. Thus, when an insurer pays out on an insured risk, any recovery that the insurer is able to obtain through subsequent subrogation is a windfall to the insurer.

Roger M. Baron, *Subrogation: A Pandora's Box Awaiting Closure,* 41 S.D. L. Rev. 237, 244 (1996). Another commentator states, "Insurers, consistently fail to introduce the factor of such recoveries into rate-determining formulae, but rather apply recoveries to increasing dividends to shareholders." John F. Dobbyn, INSURANCE LAW IN A NUTSHELL 284 (3d ed. 1996).

For this reason, courts have rejected the cost-containment argument for reimbursement, finding that "anticipated recoveries under subrogation rights are generally not reflected in the computation of premium rates." *DeCespedes v. Prudence Mut. Cas. Co.*, 193 So. 2d 224, 227-28 (Fla. Dist. Ct. App. 1967), *aff'd*, 202 So.2d 561 (Fla. 1967). *See also Travelers Indem. Co. v. Chumbley*, 394 S.W.2d 418, 425 (Mo. Ct. App. 1965) (reimbursement of medical payments coverage "does not, in fact, work a perceptible reduction in the premium charged for such coverage."); *Allstate Ins. Co. v. Druke*, 576 P.2d 489, 492 (Ariz. 1978) (similar); *Maxwell v. Allstate Ins. Cos.*, 728 P.2d 812, 815 (Nev. 1986) (similar).

Self-insured ERISA plans operate differently. Where employers pay for health benefits out of

general assets, reimbursements that go back into the general fund could be used to defray current expenditures. However, the impact on the overall costs of ERISA plans would be slight. Only about one-third of ERISA plan participants are in self-funded plans. Brief of Amicus Curiae Self-Insurance Institute of America, *supra*, at 7. Moreover, a majority of self-funded plans purchase stop-loss coverage from insurance companies to cover large claims. Troy Paredes, *Stop-Loss Insurance, State Regulation, and ERISA: Defining the Scope of Federal Preemption*, 34 Harv. J. on Legis. 233, 249 (1997). Consequently, most large claims for reimbursement, even against beneficiaries of self-funded plans, will be made by commercial insurers. This was the case, for example, in *Knudson*.

Moreover, the savings that might be passed along to plan participants are miniscule. Health Care Recoveries, Inc., the largest provider of reimbursement collection services, "reported [for 2000] subrogation recoveries averaging approximately $4.8 million for each 1 million persons covered by its clients." Brief of Amicus Curiae Self-Insurance Institute of America, *supra*, at 8, n.9. A savings of only $4.80 per covered person – far less after subtracting the costs of recovery and a profit for Health Care Recoveries, Inc. – on plans that cost over $4,000 annually does not justify the harsh treatment of some beneficiaries.[9]

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[9] *See* Kaiser Family Foundation, Employer Health Benefits: 2005 Summary of Findings (Sept. 14, 2005) at 1 (reporting average annual premium per person of $4,024. Available online <http://www.kff.org/insurance/7315/sections/upload/7316.pdf>

More fundamentally, the cost-containment argument is contrary to Congress's intent in enacting ERISA. The principle of insurance, at its simplest, allows many individuals to pay a relatively modest amount so that a few among them will be protected against financial hardship. Allowing reimbursement lawsuits will impose financial hardship on a few so that the many participants might receive a slight savings. This is insurance running in reverse.

III. ANY EQUITABLE REIMBURSEMENT OF AN ERISA PLAN SHOULD BE LIMITED TO THE REMAINDER OF A TORT RECOVERY AFTER THE BENEFICIARY HAS BEEN MADE WHOLE AND SHOULD REQUIRE THE PLAN TO BEAR ITS SHARE OF ATTORNEY FEES AND COSTS.

If this Court determines that ERISA authorizes plan fiduciaries to sue their beneficiaries for reimbursement, Amicus urges the Court to make clear that such equitable relief must be truly equitable.

A. Equitable Reimbursement Should Allow Repayment of An ERISA Plan Only After the Beneficiary Has Been Made Whole.

Equity does not award a party the pound of flesh called for in a contract the party itself drafted. Rather, "subrogation will be applied or not, according to the dictates of equity and good conscience, and to consideration of public policy, resting, as it does, upon the maxim that no one should be enriched by another's loss. George J. Couch, 16 COUCH ON INSURANCE 2d, § 61:19 (1983).

This Court has observed that Congress intended that the courts look to the settled experience of the common law in giving shape to a "federal common law of rights and obligations under ERISA-regulated plans." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989).

Consistent with the dictates of equity and public policy, most state courts that permit reimbursement out of a tort recovery have adopted a rule of equity, the "made-whole" doctrine:

> Out of the recovery from the third party the insured is to be reimbursed first, for the loss not covered by insurance, and the insurer is entitled to any remaining balance, up to a sum sufficient to reimburse the insurer fully.

Robert E. Keeton, BASIC TEXT ON INSURANCE LAW §3.10(c) (1971).

Currently, the overwhelming majority of states that allow reimbursement have adopted the made-whole doctrine. See Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation*, 70 Mo. L. Rev. 723 (2005) (summarizing the law of 32 states applying the doctrine). Several federal courts have adopted the made-whole doctrine as the default rule. *See, e.g., Cagle v. Bruner*, 112 F.3d 1510, 1521 (11th Cir. 1997) (applying the made whole doctrine where "the plan does not explicitly preclude" it). *See also* David M. Kono, *Unraveling the Lining of ERISA Health Insurer Pockets--A Vote for National Federal Common Law Adoption of the Make Whole Doctrine*, 2000 B.Y.U. L. Rev. 427, 437 (2000).

This Court should make clear that the made whole doctrine applies in any action for

reimbursement, irrespective of the plan's provisions. "Insurance contracts are prime examples of 'contracts of adhesion' . . . Insurers, due to their greater bargaining position, should not be allowed to use this as a wholesale method for controlling applicable law." *American Service Mut. Ins. Co. v. Bottum*, 371 F.2d 6, 12 (8th Cir. 1967).

B. Equitable Reimbursement Requires Deduction for Attorney Fees and Costs Incurred by the Insured.

MAMSI's plan specifically provided that the plan would bear a proportionate share of the costs and attorney fees expended to create the tort recovery. Most plan subrogation provisions, however, do not, and there is "a strong trend" against requiring plans to pay their fair share where the plan is silent. Amber Anstine, *Erisa Qualified Subrogation Liens: Should They Be Reduced To Reflect A Pro Rata Share Of Attorney Fees?* 104 Dick. L. Rev. 359, 361 (2000). *See, e.g., Ryan v. Federal Express Corp.*, 78 F.3d 123, 127 (3d. Cir. 1996) (refusing to subtract a pro rata share of reasonable attorney fees from the plan's subrogation lien), *Walker v. Wal-Mart Stores Inc.*, 159 F.3d 938, 940 (5th Cir. 1998) (refusing to interpret the plan's provisions to provide for attorney fees and expenses).

Chief Judge Posner, speaking for the Seventh Circuit, observed that refusing to require an ERISA plan to bear a fair share of the legal costs of obtaining the tort recovery "would allow the plan to free ride on the efforts of the plan participant's attorney." *Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Wells*, 213 F.3d 398, 402 (7th Cir.), *cert. denied*, 531 U.S. 985 (2000).

This Court should make clear that such unjust enrichment has no place in an action by an ERISA fiduciary for equitable relief.

CONCLUSION

For the above reasons, the decision of the court of appeals below should be reversed.

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No. 05-260

IN THE

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JOEL SEREBOFF and MARLENE SEREBOFF,
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v.

MID ATLANTIC MEDICAL SERVICES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE BLUE CROSS BLUE SHIELD ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENT

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INTEREST OF THE AMICUS CURIAE

The Blue Cross Blue Shield Association (the "Association") is the trade association that coordinates the national interests of the independent, locally operated Blue Cross and Blue Shield Plans.[1] Together, the 38 member Blue Cross and Blue Shield

[1] In accordance with Rule 37.6, the Association certifies that counsel for a party did not author this brief in whole or in part and that no entity other than the Association, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

Plans provide health insurance benefits to more than 94 million people – nearly one-third of all Americans – in all 50 states, the District of Columbia, and Puerto Rico. The Plans offer a variety of insurance products to all segments of the population, including large public and private employer groups, small businesses, and individuals.

The Blue Cross and Blue Shield Plans are subject to regulation under a variety of federal and state statutes, including the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* This case concerns the extent to which ERISA § 502(a)(3), 5 U.S.C. § 1132(a)(3), authorizes fiduciaries administering ERISA plans to bring civil actions to enforce reimbursement provisions in those plans. These provisions require the plan participant to reimburse medical expenses paid by the plan if the participant recovers money from a third party responsible for the illness or injuries that gave rise to the medical expenses.[2]

The Blue Cross and Blue Shield Plans administer or insure ERISA plans that often include such reimbursement provisions. The funds they collect help reduce the overall costs for providing ERISA benefits through the avoidance of duplicative recoveries by the affected participants. That is, absent reimbursement, some plan participants would receive double recoveries, at the expense of other plan participants, who necessarily would experience higher premiums or reduced benefits to compensate for the plan's lost reimbursement income. If the

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[2] The plan "participant" is the employee or former employee who is eligible to receive benefits under the employee benefits plan. 29 U.S.C. § 1002(7). The reimbursement provisions also apply to plan "beneficiaries" – those individuals the plan or plan participant designates as entitled to benefits as a result of their relationship with the participant. *See* 29 U.S.C. § 1002(8). For simplicity's sake, this brief will use "participant" to refer both to participants and to beneficiaries.

decision below is reversed, Blue Cross and Blue Shield entities and others administering or insuring ERISA plans will have no way to enforce reimbursement provisions, thus causing significant negative financial consequences to ERISA plans and their participants. Accordingly, the Association has a strong interest in the outcome of this case.

Counsel for the parties have filed letters with the Clerk of the Court providing consent to the filing of amicus curiae briefs supporting either party.

SUMMARY OF ARGUMENT

ERISA § 502(a)(3) allows plan fiduciaries to bring a civil action to obtain "appropriate equitable relief . . . to enforce . . . the terms of the plan." 29 U.S.C. § 1132(a)(3). In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), the Court, reaffirming earlier precedent, construed § 502(a)(3) to authorize only those forms of relief that would have been typically available in a pre-merger court of equity. The Court further concluded that a plaintiff historically could seek restitution in equity "ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* at 213.

The Fourth Circuit below, along with the Fifth, Seventh, and Tenth Circuits, correctly construed ERISA § 502(a)(3) to allow suits by plan fiduciaries to enforce reimbursement provisions where the plan fiduciary has met the criteria for restitution in equity set forth in *Great-West*. There is no reason for the Court to retreat from that conclusion, and the court of appeals correctly concluded that the plan fiduciary's suit here met those criteria. The funds are segregated in an account over which the plan participant has control, and the funds belong in good conscience to the plan by operation of the reimbursement provision. That the plan fiduciary's right to relief arises from a plan provision does not negate the characterization of the suit

as "equitable," so long as the fiduciary seeks relief in the manner authorized in *Great-West*. Section 502(a)(3) expressly allows fiduciaries to seek "appropriate equitable relief" to enforce plan terms. Were equitable relief and enforcement of plan terms mutually exclusive, that aspect of § 502(a)(3) would be rendered meaningless.

Interpreting § 502(a)(3) to foreclose the enforcement of ERISA reimbursement provisions would be inconsistent with Congress's evident intent to make all ERISA plan terms enforceable. In enacting ERISA, Congress intended to create a uniform federal scheme for the administration and enforcement of ERISA plans. Congress did not dictate the content of ERISA plans and left to employers to decide what kind and amount of benefits to provide, including whether to provide benefits at all. Rather, Congress wanted to ensure that ERISA plans are fairly and consistently administered and that the plan terms, whatever they turn out to be, are enforceable. Indeed, Congress cared so much about plan enforcement that it created an unusually "carefully crafted and detailed enforcement scheme," *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993), and then gave it "extraordinary pre-emptive power." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004).

Plan fiduciaries who seek to enforce ERISA plan terms cannot do so by invoking state law causes of action. Such actions are preempted by ERISA § 514(a) and are even "completely preempted" by § 502(a)'s enforcement provisions. *Davila*, 542 U.S. at 204. Congress intended ERISA's civil enforcement provision to be the exclusive vehicle for enforcing plan terms. *Id.* at 208-09; *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-56 (1987). Because state law remedies are preempted, § 502(a)(3) is the exclusive means by which an ERISA plan fiduciary can enforce a reimbursement provision in an ERISA plan contract. If the Court were now to construe "appropriate equitable relief" narrowly as excluding such actions even in the circumstances allowed under *Great-West*, then ERISA plan

fiduciaries would have no remedy against plan participants who violate ERISA plan reimbursement provisions, a result that could not have been intended by Congress. Instead, § 502(a)(3) should be construed in accordance with Congress's desire to promote adherence to plan terms through appropriate enforcement mechanisms.

ARGUMENT

ERISA subjects to federal regulation employee pension and welfare benefit plans that provide "medical, surgical, or hospital care or benefits" "through the purchase of insurance or otherwise." 29 U.S.C. § 1002(1). The statute does not require employers to provide health benefit plans to their employees, nor does it dictate plan content. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 651 (1995) (ERISA "does not go about protecting plan participants and their beneficiaries by requiring employers to provide any given set of minimum benefits, but instead controls the administration of benefit plans."); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) ("plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans"). Instead, the focus of ERISA is on providing "a uniform regulatory regime." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004).

Two features of the statute particularly carry out that purpose. First, ERISA's expansive preemption provision, § 514(a), 29 U.S.C. § 1144(a), ensures that ERISA plans are "subject to a uniform body of benefits law" and "minimize[s] the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990). Second, ERISA's comprehensive, integrated enforcement mechanism, § 502(a), 29 U.S.C. § 1132(a), ensures that ERISA plan terms are enforceable. This Court has described the enforcement scheme as "one of the essential tools

for accomplishing the stated purposes of ERISA." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987). Both the preemption provision and the enforcement scheme are relevant to the issue presented, but we turn first to the enforcement scheme.

A. ERISA's Enforcement Provisions Are Central to the Statutory Scheme and Provide for the Enforcement of All ERISA Plan Terms

ERISA's detailed enforcement mechanism is "a distinctive feature" of that statute and contrasts with many other federal statutory schemes that devote relatively little attention to enforcement mechanisms. *Davila,* 542 U.S. at 208. This Court has recognized that ERISA's enforcement provisions are "essential to accomplish Congress' purpose of creating a comprehensive statute for the regulation of employee benefit plans." *Id.* The principal civil enforcement provisions are the first three, which each address different features of plan administration. Section 502(a)(1) allows a plan participant to sue to recover benefits due under the terms of the plan, to enforce her rights under the plan, or to clarify rights to future benefits. Section 502(a)(2) allows the Secretary of Labor, plan participant, or fiduciary to bring suit for breach of fiduciary duty. Section 502(a)(3), the provision directly at issue here, authorizes civil suits brought "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan." 29 U.S.C. § 1132(a)(3).

The Court has emphasized that this enforcement scheme does not encompass every possible kind of remedy. For example, in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985), the Court held that ERISA does not authorize punitive damages for breach of fiduciary duty. In *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255-58 (1993), the Court held that § 502(a)(3), in establishing a cause of action for "appropri-

ate equitable relief," did not authorize suits for compensatory damages because that relief was not typically available in equity.

But these limitations go only to the *type* of relief available; they do not carve out a sphere of immunity from enforcement. Consistent with the centrality of the enforcement provisions to the statutory scheme, ERISA offers *some* form of remedy for *all* plan violations. Section 502(a)(1) broadly allows plan participants to recover benefits and enforce rights "under the plan." Section 502(a)(3) allows plan participants or fiduciaries to enjoin violations of "the terms of the plan" or to "obtain other appropriate equitable relief . . . to enforce . . . the terms of the plan." These provisions draw no distinction among different categories of plan provisions, instead making their enforcement tools generally applicable to all plan terms.

B. ERISA Reimbursement Provisions Are Enforceable Under § 502(a)(3) If the Criteria Set Forth in *Great-West* Are Satisfied

Despite Congress's manifest and concerted effort to provide in § 502(a) a remedy for all ERISA plan violations, petitioners assert that ERISA plan reimbursement provisions are not enforceable under the ERISA enforcement scheme because "pre-merger courts of equity would never have classified MAMSI's attempt to obtain money to fulfill a contractual reimbursement obligation as one that qualified for equitable relief." Pet. Br. 11 (footnote omitted). That broad contention contradicts this Court's analysis in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). There, the Court considered the circumstances under which ERISA plan reimbursement provisions are enforceable under § 502(a)(3). The Court interpreted § 502(a)(3)'s authorization of civil actions seeking "other appropriate equitable relief" as referring to "those categories of relief that were *typically* available in equity." *Id.* at 210. The Court explained that "a plaintiff could seek restitution in *equity*, ordinarily in the form of a constructive trust or

an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* at 213.

The Court found that this test was not met by the plan fiduciaries in *Great-West* because the funds they sought were not in the beneficiaries' possession or control but rather had been disbursed to a Special Needs Trust and to the beneficiaries' attorney. *Id.* at 214. "The kind of restitution that [the fiduciaries] seek, therefore, is not equitable – the imposition of a constructive trust or equitable lien on particular property – but legal – the imposition of personal liability for the benefits that they conferred upon [the beneficiaries]." *Id.*

The Court left open the possibility that the plan fiduciaries "could have obtained equitable relief against [the beneficiaries'] attorney and the trustee of the Special Needs Trust." *Id.* at 220. Great-West, however, had not appealed the District Court's denial of its motion to amend its complaint to add these individuals as co-defendants, and therefore the Court did not determine whether an action by Great-West against those parties would have fallen within § 502(a)(3).

In addition to the Fourth Circuit, three other courts of appeals have interpreted *Great-West* as describing circumstances under which a plan's action for reimbursement against a plan participant will be treated as seeking appropriate equitable relief. *Admin. Comm. of the Wal-Mart Assocs. Health & Welfare Plan v. Willard*, 393 F.3d 1119 (10th Cir. 2004); *Admin. Comm. of the Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan v. Varco*, 338 F.3d 680 (7th Cir. 2003), *cert. denied*, 542 U.S. 945 (2004); *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough, P.C.*, 354 F.3d 348 (5th Cir. 2003), *cert. denied*, 541 U.S. 1072 (2004). These courts did not question the correctness of the distinction this Court drew in *Great-West*, but rather focused their analysis on whether the reimbursement suit at issue satisfied the conditions

set forth there for "equitable relief" within the meaning of § 502(a)(3).

In contrast, the Ninth Circuit in *Westaff (USA), Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002), joined two years later by the Sixth Circuit in *Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (6th Cir. 2004), *cert. denied*, 125 S. Ct. 1639 (2005), essentially ignored the *Great-West* analysis and independently determined that a suit to enforce a reimbursement provision in an ERISA plan is legal in nature regardless of whether the plan participant possesses an identifiable fund. *Westaff*, 298 F.3d at 1167; *Qualchoice*, 367 F.3d at 646. Both the Sixth and Ninth Circuits concluded that such suits are legal and not equitable in nature because they seek to enforce a contractual obligation.

This cramped interpretation of "equitable relief" directly conflicts with the plain language of § 502(a)(3). That section states unequivocally that ERISA plans can bring suit "to obtain other equitable relief . . . to enforce . . . the terms of the plan." Referring to plan terms as "contractual obligations" provides no justification for avoiding the plain dictates of the statute. Congress specifically authorized suits to enforce plan terms, and therefore it necessarily used the term "equitable relief" to include such enforcement actions, whether or not the plan provisions are deemed "contractual." *See also Great-West*, 534 U.S. at 212-15 (recognizing that "restitution in equity" was available to remedy a breach of contract); *Mertens*, 508 U.S. at 253 (emphasizing that § 502(a)(3) does not "authorize 'appropriate equitable relief' *at large*, but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations or . . . enforc[ing] any provisions' of ERISA or an ERISA plan.").

The Court's statement in *Great-West* regarding the type of reimbursement suit that typically was available in a traditional court of equity was the product of extensive research and careful consideration. *See* 534 U.S. at 213 (citing 1 D. Dobbs, *Law of Remedies* § 4.3(1), at 587-88 (2d ed. 1993); *Restatement of Restitution* § 160, Comment *a*, at 641-42 (1936); 1 G. Palmer,

Law of Restitution § 1.4, at 17; *id.* § 3.7, at 262 (1978)). The Fourth Circuit, along with the Fifth, Seventh, and Eleventh Circuits properly obeyed *Great-West*'s standard, and there is no reason to retreat from it here.

C. Violations of ERISA Plan Reimbursement Provisions Cannot Be Remedied Under State Law

The Court's continued adherence to the *Great-West* standard is all the more critical because state law in this area is pre-empted. Thus, ERISA plan reimbursement provisions must be enforced through § 502(a)(3), or not at all. Section 514(a) of ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," 29 U.S.C. § 1144(a), and saves from preemption only those state laws that regulate insurance, banking, or securities. 29 U. S. C. § 1144(b)(2)(A).

The Court has often visited the subject of the preemptive reach of § 514(a), sometimes grappling with difficult issues in defining its precise contours. *See California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A, Inc.*, 519 U.S. 316, 324 (1997) ("relate to" statutory language is "unhelpful"); *Travelers*, 514 U.S. at 655 (preemption provision is "clearly expansive" but "relate to" language should not be extended "to the furthest stretch of its indeterminacy"). The preemption principles relevant to this case, however, emerged early on in the Court's ERISA preemption jurisprudence and have remained well settled to this day.

In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983), the Court held that state laws may "relate to" employee benefit plans and thus be preempted by § 514(a) even if they are not "specifically designed to affect employee benefit plans." Soon thereafter, the Court held that common law tort and breach of contract actions for improper processing of claims for benefits "undoubtedly meet the criteria for pre-emption under § 514(a)." *Pilot Life*, 481 U.S. at 48; *see also Davila*, 542 U.S. at 219 n.6 (reaffirming holding in *Pilot Life* that the "causes of

action were pre-empted"). Therefore, even though state contract laws presumably would authorize an action to enforce a reimbursement provision in a plan, those state laws would not be immunized from preemption simply because they are laws of general applicability, rather than laws specifically directed at employee benefit plans.

In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), the Court amplified its holding in *Pilot Life*, explaining that ERISA preempts state law causes of action for violation of ERISA plan terms because those actions "relate to" an employee benefit plan in that they are premised on the existence of an employee benefits plan. The plaintiff in *Ingersoll-Rand* filed a state court action alleging that he was wrongfully terminated because of the employer's desire to avoid contributing to, or paying benefits under, the employee's pension fund. The plaintiff asserted various state law contract and tort theories. The Court concluded that the state law cause of action "relates to" an employee benefits plan because it "makes specific reference to, and indeed is premised on, the existence of a pension plan." *Id.* at 140. As the Court observed, "there simply is no cause of action if there is no plan." *Id.*

Similarly, a state law breach of contract action to enforce an ERISA plan reimbursement provision would necessarily make direct reference to and be premised on the existence of the plan. Under the reasoning of *Ingersoll-Rand*, that action necessarily would be preempted. Absent the ERISA plan reimbursement provision, the plan fiduciary would have no state law breach of contract action. The state law action thus "relates to" the employee benefits plan because the violation of the plan term provides the basis for the action. *See Liberty Northwest Ins. Corp. v. Kemp*, 85 P.3d 871, 877-78 (Or. Ct. App. 2004) (state common law breach of contract action for reimbursement is preempted under reasoning of *Ingersoll-Rand*).

Moreover, state law breach of contract actions are not saved from preemption by the savings clause because they are not

specifically directed toward entities engaged in insurance and do not substantially affect the risk pooling arrangement between the insurer and the insured. *See Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 342 (2003). Rather, they are general common law causes of action unrelated to any insurance principles. Therefore, the savings clause would not provide a basis for a plan fiduciary to seek to enforce the reimbursement terms of the ERISA contract under state law.

Furthermore, state law causes of action in the reimbursement context are preempted not only by § 514(a) but also by the "extraordinary pre-emptive power" of § 502(a)'s enforcement provisions. *Davila*, 542 U.S. at 209; *see also Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 376 (2002) (describing "extraordinarily preemptive power" of ERISA's civil enforcement provisions). As noted in *Davila*, 542 U.S. at 211, § 502(a) completely preempts (and therefore makes removable to federal court) state law causes of action seeking to enforce "the terms of ERISA-regulated employee benefit plans." ERISA's remedial scheme thus preempts all state law causes of action that would duplicate, supplement, or supplant ERISA's civil enforcement remedy. That would be the case, even if a state law reimbursement claim somehow were saved from preemption under ERISA's insurance savings clause. *See id.* at 217.

Petitioners suggest (Pet. Br. 27 & n.14, 31-32), however, that state law remedies for enforcement of reimbursement provisions have not been preempted by ERISA. It is true that this Court did not specifically address this point in *Great-West*, stating that it "express[ed] no opinion as to . . . whether a direct action by [the insurer] against [the insured] asserting state-law claims such as breach of contract would have been pre-empted by ERISA." 534 U.S. at 220; *see also id.* at 227 (Ginsburg, J., dissenting) (suggesting that "ERISA plans and fiduciaries unable to fit their suits within the confines of the Court's opinion . . . may seek enforcement of reimbursement provisions . . .

only in state court," but some of those suits "may be preempted by ERISA itself"). But whatever doubt might have existed about the ability to enforce ERISA reimbursement provisions through state-law breach of contract actions was removed by the Court's recent decision in *Davila*. Such actions are preempted by ERISA.

D. In Accordance with the Statutory Text and the Strong Congressional Intent to Make Plan Terms Enforceable, § 502(a)(3) Should Be Interpreted to Authorize Causes of Action That Satisfy the *Great-West* Standard

Because state law causes of action to enforce ERISA plan terms are preempted, ERISA provides the sole vehicle for enforcing reimbursement provisions. Interpreting § 502(a)(3) to allow such suits – so long as they meet the *Great-West* standard – is the only result that is consistent with Congressional intent that ERISA plan terms be enforceable.

To be sure, the Court has made clear that ERISA's combination of a detailed, but not all-encompassing, enforcement scheme and preemption of state law remedies may sometimes leave a plaintiff without a type of remedy that would have been available at common law before ERISA. *See, e.g., Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985). That is because the specificity of ERISA's enforcement provisions "provide strong evidence that Congress did not intend to authorize other remedies" like punitive damages. *Id.* at 146. But that principle has no application here where the text of ERISA's enforcement provisions do encompass the remedy in question, and adoption of petitioners' position would leave plan fiduciaries with no remedy at all for a violation of plan terms.

As the Court stated in *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996), § 502(a)(3) is a "'catchall' provision" that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately

remedy." For the reasons stated by the Court in *Great-West*, the action brought by respondent here is a suit for "equitable relief" within the meaning of that provision. Accordingly, affirmance of the decision below would adhere to the statutory text and further the evident intent of Congress to promote adherence to ERISA plans by making their terms enforceable in court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

JOEL SEREBOFF and MARLENE SEREBOFF,

Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*

Central States, Southeast and Southwest Areas Health and Welfare Fund ("CS Fund") respectfully submits this brief as *amicus curiae* in support of the respondent, Mid Atlantic Medical Services, Inc. The parties have filed blanket letters of consent to the filing of *amicus curiae* briefs with this Court[1].

The CS Fund is an "employee welfare benefit plan" and a "multiemployer plan" as defined in Sections 3(1) and 3(37)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1002(1) and 1002(37)(A), founded in 1950 and funded primarily by thousands of contributing employers, to provide continuing healthcare benefits coverage, on a fully self-funded (non-insured) basis, for many hundred thousand participants (active and retired) and covered dependents. Those covered individuals reside, and receive medical care, throughout the United States. The direct expenses of such benefits coverage incurred by the CS Fund reached a highest annual amount, exclusive of plan administrative expenses, of $1,054,639,636 for the year 2002 (cost containment measures have reduced benefit expenses in subsequent years). For more than twenty years the CS Fund's plan documents have provided, as a condition of benefits coverage, for full reimbursement to the CS Fund of its injury-related benefit payments from injury-related tort liability recoveries by its active and retired participants and their covered dependents. A recent internal audit disclosed that annual gross recoveries from this program

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[1] This brief has been authored entirely by counsel for the CS Fund. No counsel for a party to this proceeding authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members and its counsel, made a monetary contribution to the preparation or submission of this brief.

to the CS Fund, in the 1995-2004 period, ranged from a high around $5.98 million in 2001 to a low around $4.29 million in 1997. The CS Fund's active and retired benefit plan documents, relative to such full reimbursement rights, have long included (emphasis in originals):

> ". . . The Fund's entitlement to full payment and reimbursement of its Subrogation Rights is absolute and unqualified, and is not to be reduced or impaired by the relationship of the gross or net amount of the Proceeds to the aggregate monetary damages sustained, or claimed to be sustained, by the Covered Individual in connection with the Disability related to his or her Loss Recovery Rights. The Fund's Subrogation Rights are not in any way subordinate to or affected by any 'make whole' rule. . .. The Fund's Subrogation Rights are not in any way subordinate to or affected by any 'common fund' principle or factor—sometimes described as the equitable concept of a 'common fund' which governs the allocation of attorney's fees in any case in which a lawyer hired by one party creates through his efforts a fund in which others are entitled to share as well—the acceptance of plan benefits from the Fund entirely subordinates the Loss Recovery Rights of the Covered Individual to the Subrogation Rights of the Fund (without any 'common fund' reduction or other reduction of those Subrogation Rights). . . ."

The CS Fund's plan documents have also long entitled it, whenever such reimbursement is owed but refused, ". . . to decline to make any payment for any benefits on behalf of the [refusing] Covered Individual, related to any circumstance or condition for which the Fund otherwise has a Coverage obligation, until the amount of such unpaid Coverage is equal to the unrecovered amount of the Fund's Subrogation Rights. . .." If the significant revenue to the

CS Fund from enforcement of these injury-related reimbursement rights were to be eliminated or greatly reduced by the outcome of this case, that result might require the CS Fund to adopt plan amendments reducing or restricting current healthcare benefits coverage.

SUMMARY OF ARGUMENT

In its interpretation and application of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), the court of appeals reached the following conclusions:

> "We agree with the district court that, in this dispute, MAMSI's action seeks restitution, as that term is used in *Knudson*, because MAMSI seeks to recover funds that are specifically identifiable, belong in good conscience to MAMSI, and are within the possession and control of the Sereboffs. First, the funds have not been dissipated, and they are specifically identifiable. . .. [T]he funds . . . can 'clearly be traced to particular funds' recovered in the California litigation. *Knudson*, 534 U.S. at 213, 122 S.Ct. 708.
>
> "Second, the disputed funds belong in good conscience to MAMSI. The Plan contains express, unambiguous reimbursement provisions according MAMSI the 'right to recover any payments' made to the Sereboffs by a third party. Third, the disputed funds are within the possession and control of the Sereboffs. . .."

Mid Atlantic Medical Services, LLC v. *Sereboff*, 407 F.3d 212, 218-219 (4th Cir. 2005).

In their brief on the merits ("Pet.Br."), petitioners make no challenge to the district court's finding that "the funds in question 'belong in good conscience to the Plan' ", stating

that this "is perhaps true as a matter of fairness." Pet.Br., at 21. Petitioners argue that there are, however, insurmountable barriers to respondent's **equitable** restitution (by either a constructive trust or an equitable lien) from their personal-injury settlement proceeds, and that not only does the respondent have an adequate remedy at law (against petitioners) but that equity-required tracing to those proceeds (as a prerequisite of equitable restitution) is impossible. *Id.*, at 17-27.

Petitioners' contention that respondent has an adequate remedy at law, *id.*, at 27, is without merit. As the Court decided in *FMC Corp.* v. *Holliday*, 498 U.S. 52 (1990), ERISA pre-emption exempts self-funded ERISA plans (such as respondent) from state antisubrogation laws such as Pennsylvania's. *Id.*, at 61-65. Any state law or state-law remedy for enforcement of a self-funded ERISA plan's rights to reimbursement of injury-related medical expense payments from injury-related settlements, rights which are not independent of ERISA or the plan's terms, falls squarely within the scope of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), and is pre-empted. Since that ERISA enforcement provision expressly excludes any non-equitable relief or remedy, respondent has no remedy at law (much less an adequate one) for enforcement of its plan-created right to reimbursement from petitioners.

Petitioners' contention that respondent is not entitled to equitable restitution from the identifiable settlement proceeds in petitioners' possession, Pet.Br., at 17-30, is also without merit. The central theme of petitioners' argument is that, although "the ability to trace the plaintiff's funds is critical", *id.*, at 19, the lack of tracing to respondent's property must defeat its quest for equitable relief:

> "In this case, MAMSI's claim is *not* for return of particular money that the Plan paid to the

> Sereboffs and that the Sereboffs still retain. There is absolutely no evidence in the record that any Plan money was ever paid to the Sereboffs, as opposed to providers of their medical services. . .. Moreover, any money that the Plan paid on behalf of the Sereboffs has already been spent on legitimate medical expenses. What MAMSI is seeking, therefore, is not the return of Plan money or profits from its use or exchange. Rather, MAMSI is seeking to recover new money paid out by third parties, the alleged tortfeasors.
>
> "The district court's assertion that the funds in question ''belong in good conscience to the Plan' . . .' is perhaps true as a matter of fairness. Mere fairness, however, is the wrong criteria by which to judge if a remedy was 'typically available in equity.' . . .
>
> "Whether or not funds 'belong in good conscience' to another, the ability to seek restitution of those funds - absent the tracing described above - was not 'typically available at equity.' [Citation omitted.] . . . ."

Id., at 20-22. That argument overlooks economic realities. Respondent offered, and petitioners accepted the bargain, that respondent would pay the injury-related medical expenses involved ($74,869.37) on condition that, pursuant to the terms of respondent's plan, petitioners would reimburse respondent from their ultimate injury-related settlement proceeds ($750,000). The settlement proceeds ($750,000) resulted in part from, and included reimbursement for, all of the medical expenses involved ($74,869.37). Petitioners' settlement proceeds to that partial extent are the product of, and are traceable to, respondent's medical expense payments. A constructive trust or an equitable lien upon identifiable and non-dissipated settlement

proceeds is a typical equitable remedy to enforce a plan's reimbursement rights and to prevent unjust enrichment.

Petitioners' final point, several *make whole* arguments, Pet.Br., at 30-35, was not raised and considered in the court of appeals, is not included in the question on which certiorari was granted and is outside the scope of this Supreme Court review.

ARGUMENT

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), enables a fiduciary of an ERISA-defined employee welfare benefit plan to secure a judgment for equitable restitution from identifiable personal injury settlement proceeds in the possession of plan covered individuals, in order to enforce the terms of the plan that entitle the plan to reimbursement, from those proceeds, of injury-related medical expense payments by the plan.

The issue now under review reflects a predictable dispute about this Court's decision in *Great West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204 (2002). Construing ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)—which among other things authorizes an ERISA plan fiduciary to bring a civil action ". . . to obtain other appropriate **equitable** relief . . . to enforce . . . the terms of the plan" (emphasis added)—this Court in *Knudson* decided that "[b]ecause petitioners are seeking legal relief—the imposition of personal liability on respondents for a contractual obligation to pay money—§ 502(a)(3) does not authorize this action." *Id.*, at 221. The expressed reasoning in *Knudson* provided a roadmap for the federal judiciary and for the resolution of the issue now under review.

The *Knudson* reasoning includes (*id.*, at 213-214; emphasis in original):

> "In contrast, a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. [Citations omitted.] A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where 'the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor,' and the plaintiff 'cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant].' [Citation omitted.] Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession."

If *Knudson* were intended to preclude **any** court-ordered equitable restitution to an ERISA plan from a personal-injury monetary recovery by a plan covered individual—despite the plan's clearly stated reimbursement rights in that recovery (found in "the terms of the plan")—then the above-excerpted analysis and roadmap would have been superfluous.[2] Such was clearly not,

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[2] In the case now under review, the United States Court of Appeals for the Fourth Circuit quoted from and then applied the *Knudson* roadmap. *Mid Atlantic Medical Services, LLC* v. *Sereboff*, 407 F.3d 212, 218 (4th Cir. 2005) ("We agree with the

(continued...)

however, the intention of this Court in *Knudson*.

In their brief on the merits, petitioners take no issue with the district court's finding that respondent satisfies the "belonging in good conscience" requirement of the above *Knudson* excerpt, stating that this is "perhaps true

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[2] (...continued)
district court that, in this dispute, MAMSI's action seeks equitable restitution, as that term is used in *Knudson*, because MAMSI seeks to recover funds that are specifically identifiable, belong in good conscience to MAMSI, and are within the possession and control of the Sereboffs."). Other circuit courts have applied the *Knudson* roadmap in much the same fashion. *Administrative Committee of Wal-Mart Stores, Inc. Associates' Health and Welfare Plan* v. *Varco*, 338 F.3d 680, 688 (7th Cir. 2003) ("Thus, under *Great-West Life*, the reimbursement action by the Committee in this unique case is equitable because the funds the Committee seeks to recover are identifiable, are in the control of a defendant, and the Committee is right-fully entitled to the monies under the terms of the Plan. Because those elements are met here, the Committee's claim is equitable under § 502(a)(3)(B) of ERISA . . ."), cert. denied, 542 U.S. 945 (2004); *Bombardier Aerospace Employee Welfare Benefits Plan* v. *Ferrer, Poirot and Wansbrough*, 354 F.3d 348, 356 (5th Cir. 2003) ("Unlike the beneficiaries in *Knudson* and *Bauhaus*, the Plan's participant, Mestemacher, has ultimate control over, and thus *constructive* possession of, the disputed funds. . .. This crucial distinction is more than sufficient to warrant a finding that the Plan's action is indeed 'equitable' in nature."), cert. denied, 541 U.S. 1072 (2004); and *Administrative Committee Of Wal-Mart Associates Health and Welfare Plan* v. *Willard*, 393 F.3d 1119, 1125 (10th Cir. 2004) ("Rather, we find that the instant case, rather than involving one for monetary damages, involves exactly the type of equitable restitution claim the Court had in mind in *Great-West*.").

as a matter of fairness." Pet.Br., at 21. Petitioners argue that there are, however, insurmountable barriers to respondent's **equitable** restitution (by either a constructive trust or an equitable lien) from their personal-injury settlement proceeds, and that not only does the respondent have an adequate remedy at law (against petitioners) but that equity-required tracing to those proceeds (as a prerequisite of equitable restitution) is impossible. *Id.*, at 17-30. These arguments are not persuasive.

A. Respondent does not have an adequate remedy at law.

The notion that respondent has an adequate remedy at law against petitioners is lacking in merit.[3] This is an issue left open in *Knudson* ("We express no opinion as to . . . whether a direct action by petitioners against

---

[3] Petitioners contend that respondent has an adequate remedy law, stating that "any claim to an implied-in-fact equitable lien would rest entirely on the grounds that MAMSI had no adequate remedy at law by which to enforce its contractual rights", Pet. Br., at 27, and then observing (with citation to a law review comment) that "[t]he premise of this argument ["MAMSI had no adequate remedy at law. . .."] has not remotely been established." *Id.*, n. 14. That issue, whether or not an adequate legal remedy bars a constructive trust, is one on which certain standard works differ, as the *Knudson* dissent by Justice Ginsburg demonstrates. 534 U.S., at 232. Other works that differ on this issue are cited in *Heckmann* v. *Ahmanson*, 168 Cal.App.3d 119 (Cal.App. 1985), which states that "[i]n California, as in most jurisdictions, an action in equity to establish a constructive trust does not depend on the absence of an adequate legal remedy." *Id.*, at 134. In the case at bar, respondent has no remedy at law.

respondents asserting state-law claims such as breach of contract would have been pre-empted by ERISA. . .."). 534 U.S. at 220. In *Providence Health Plan* v. *McDowell*, 385 F.3d 1168 (9th Cir. 2004), cert. denied, 125 S.Ct. 1726 (2005) and 125 S.Ct. 1735 (2005), the court of appeals concluded that the ERISA plan's state court "breach of contract action . . . does not fall within ERISA's civil enforcement provision, 29 U.S.C. § 1132(a), ... [and] is not preempted under [29 U.S.C.] § 1144 . . . ." 385 F.3d, at 1172-73. Six Circuit Judges joined in a dissent from the denial of rehearing en banc in *McDowell*, the dissent stating in part that "[t]his decision marks a profound change in ERISA law and a significant deviation from Supreme Court and Ninth Circuit precedent." 385 F.3d, at 1175.[4]

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[4] The dissent in *McDowell* also includes (385 F.3d, at 1176):

> "On the other hand, we have also held that insurers' state common law and equitable reimbursement actions against plan participants were also pre-empted by ERISA. [Citations omitted.]
>
> "Thus, until now, our circuit has taken a consistent view of ERISA preemption in the context of common law and equitable actions between ERISA plan participants and third party insurers. If the cause of action involves an ERISA-governed relationship, the parties are confined to the remedies prescribed by ERISA. This case marks a radical departure from our precedent, allowing an ERISA insurer to pursue independent claims for reimbursement from the plan participant. This cannot be reconciled with our precedent, nor with the Supreme Court's ERISA decisions. . .."

As the six dissenters observed, the holding in *McDowell* that the ERISA plan's state court action for reimbursement "is not preempted" by ERISA § 514, 29 U.S.C. § 1144, "marks . . . a significant deviation from Supreme Court and Ninth Circuit precedent." 385 F.3d, at 1175. By common law rule and state legislation, many states prohibit creation or assignment of reimbursement or subrogation rights in personal-injury claims and recoveries (and a nationwide self-funded plan such as the CS Fund would face a broadside of such state laws unless insulated by ERISA pre-emption). One such state law (a provision in Pennsylvania's Motor Vehicle Financial Responsibility Law, 75 Pa.C.S.A. §§ 1719-20) reached this Court in *FMC Corp.* v. *Holliday*, 498 U.S. 52 (1990). In "hold[ing] that ERISA pre-empts the application of . . . [the Pennsylvania statute] to the [self-funded] FMC Salaried Health Care Plan", *id.*, at 65, the Court applied a broad construction of ERISA § 514, 29 U.S.C. § 1144, stating among other things (498 U.S., at 58-60):

> "Pennsylvania's antisubrogation law 'relate[s] to' an employee benefit plan. We made clear in *Shaw v. Delta Air Lines, supra*, that a law relates to an employee welfare plan if it has 'a connection with or reference to such a plan.' *Id.*, 463 U.S., at 96-97, 103 S.Ct., at 2899-2900 (footnote omitted). We based our reading in part on the plain language of the statute. Congress used the words ' 'relate to' in § 514(a) [the pre-emption clause] in their broad sense.' *Id.*, at 98, 103 S.Ct., at 2900. It did not mean to pre-empt only state laws specifically designed to affect employee benefit plans. That interpretation would have made it unnecessary for Congress to enact ERISA § 514(b)(4), 29 U.S.C. § 1144(b)(4), which exempts from pre-emption 'generally' applicable criminal laws of a State. We

also emphasized that to interpret the pre-emption clause to apply only to state laws dealing with the subject matters covered by ERISA, such as reporting, disclosure, and fiduciary duties, would be incompatible with the provision's legislative history because the House and Senate versions of the bill that became ERISA contained limited pre-emption clauses, applicable only to state laws relating to specific subjects covered by ERISA. These were rejected in favor of the present language in the Act, 'indicat[ing] that the section's pre-emptive scope was as broad as its language.' *Shaw v. Delta Air Lines*, 463 U.S., at 98, 103 S.Ct., at 2901.'

* * * * *

"The Pennsylvania statute also has a 'connection' to ERISA benefit plans. In the past, we have not hesitated to apply ERISA's pre-emption clause to state laws that risk subjecting plan administrators to conflicting state regulations. See, *e.g., Shaw v. Delta Air Lines, supra*, at 95-100, 103 S.Ct., at 2898-2902 (state laws making unlawful plan provisions that discriminate on the basis of pregnancy and requiring plans to provide specific benefits 'relate to' benefit plans); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523-526, 101 S.Ct. 1895, 1906-1908, 68 L.Ed.2d 402 (1981) (state law prohibiting plans from reducing benefits by amount of workers' compensation awards 'relate[s] to' employee benefit plan). To require plan providers to design their programs in an environment of differing state regulations would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits. See *Fort Halifax*

Packing Co. v. Coyne, 482 U.S. 1, 10, 107 S.Ct. 2211, 2217, 96 L.Ed.2d 1 (1987). Thus, where a 'patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation,' we have applied the pre-emption clause to ensure that benefit plans will be governed by only a single set of regulations. *Id.*, at 11, 107 S.Ct., at 2217.

"Pennsylvania's antisubrogation law prohibits plans from being structured in a manner requiring reimbursement in the event of recovery from a third party. It requires plan providers to calculate benefit levels in Pennsylvania based on expected liability conditions that differ from those in States that have not enacted similar antisubrogation legislation. Application of differing state subrogation laws to plans would therefore frustrate plan administrators' continuing obligation to calculate uniform benefit levels nationwide. Accord, *Alessi v. Raybestos-Manhattan, Inc.*, *supra* (state statute prohibiting offsetting worker compensation payments against pension benefits pre-empted since statute would force employer either to structure all benefit payments in accordance with state statute or adopt different payment formulae for employers inside and outside State). As we stated in *Fort Halifax Packing Co. v. Coyne*, *supra*, at 9, 107 S.Ct., at 2216, '[t]he most efficient way to meet these [administrative] responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.'"

ERISA pre-emption exempts self-funded ERISA plans from state antisubrogation laws such as Pennsylvania's, *id.*, at 61-65, and the parties in the case at bar stipulated in the district court that respondent ". . . is a self-funded employee welfare benefit plan within the meaning of 29 U.S.C. § 1002(1)." *Mid Atlantic Medical Services, Inc.* v. *Sereboff*, 303 F.Supp.2d 691, 697 (D.Md. 2004). Despite the broad insulation of nationwide (and other) self-funded ERISA plans from a *patchwork* of conflicting state antisubrogation laws which *FMC* provides, the recognition of an available state-court legal (as distinct from equitable) restitution remedy by the Ninth Circuit in *McDowell* conflicts with *FMC* and strips that insulation away.[5] If for example the CS Fund, in the enforcement of its injury-related reimbursement rights (*see* p. 1-2, *supra*), were to commence such an action in a Pennsylvania state court against one or more of its Pennsylvania covered individuals, no ERISA pre-emption (according to *McDowell*) would apply and the Pennsylvania law addressed in *FMC* (75 Pa.C.S.A. §§ 1719-20) would require dismissal of the CS Fund's state law claim.[6] That such a result cannot be

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[5] Petitioners cite a recent law review comment, Brian A. Perez-Daple, *Legal Reimbursement Claims by ERISA Plan Fiduciaries*, 72 U.Chi.L.Rev. 1103 (2005). Pet.Br., at 27. The writer concludes that "[t]he Supreme Court could formalistically interpret its most recent precedent to forbid state law reimbursement claims by ERISA fiduciaries against double-collecting beneficiaries, but it ought not do so . . ." (*id.*, at 1126).

[6] ERISA preemption does not compel Pennsylvania or any other state to fashion a state-court legal remedy for affirmative enforcement of self-funded ERISA plans' injury-related reimbursement rights in state court actions. The CS Fund has

(continued...)

reconciled with the *FMC* holding is confirmed by the Court's decision in *Aetna Health Inc.* v. *Davila*, 542 U.S. 200 (2004). That decision prescribes an ERISA litmus test for state laws that approach or fall within the scope of ERISA's enforcement remedy. The Court's opinion includes (*id.*, at 208-210):

> ". . . This integrated enforcement mechanism, ERISA § 502(a), 29 U.S.C. § 1132(a), is a distinctive feature of ERISA, and essential to accomplish Congress' purpose of creating a comprehensive statute for the regulation of employee benefit plans. . .. Therefore, any state-law cause of action that duplicates, supplements, or supplants the

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[6] (...continued)
only 258 active and retired participants living in Pennsylvania (and their covered dependents), according to its records and a recent count, which also disclose that since the early 1980s it has opened 215 files for enforcement of its injury-related reimbursement rights relative to personal injury claims by Pennsylvania covered individuals. (Where several covered individuals are injured in one accident, only one file is opened.) Absent ERISA pre-emption, the CS Fund would be vulnerable to similar antisubrogation laws in many states in which the CS Fund's participants are much more numerous. An example is Missouri, in which state law (unless pre-empted by ERISA) would preclude enforcement of the CS Fund's injury-related reimbursement rights as a state-law remedy in a state court action. *Travelers Indem. Co.* v. *Chumbley*, 394 S.W. 2d 418, 423 (Mo. App. 1965). The CS Fund has 10,037 active and retired participants living in Missouri (and their covered dependents), according to its records and a recent count, which also disclose that since the early 1980s it has opened 8,278 files for enforcement of its injury-related reimbursement rights relative to personal injury claims by Missouri covered individuals.

> ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted. [Citations omitted.]"
>
> * * * * *
>
> "It follows that if an individual brings suit complaining of a denial of coverage for medical care, where the individual is entitled to such coverage only because of the terms of an ERISA-regulated employee benefit plan, and where no legal duty (state or federal) independent of ERISA or the plan terms is violated, then the suit falls 'within the scope of' ERISA § 502(a)(1)(B). *Metropolitan Life, supra*, at 66, 107 S.Ct. 1542. In other words, if an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B), and where there is no other independent legal duty that is implicated by a defendant's actions, then the individual's cause of action is completely pre-empted by ERISA § 502(a)(1)(B)."

That litmus test, applied to a self-funded ERISA plan's injury-related reimbursement rights to which the plan ". . . is entitled . . . only because of the terms of an ERISA-regulated employee benefit plan", confirms that any state law or state-law remedy for enforcement of those rights (rights which are not "independent of ERISA or the plan terms") falls squarely within the scope of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), and is pre-empted. Since that ERISA enforcement provision expressly excludes any non-equitable relief or remedy, respondent has no remedy at law (much less an adequate one) for enforcement of its plan-created right to reimbursement from petitioners.

B. Respondent is entitled to restitution *in equity*, in the form of a constructive trust or equitable lien, from the identifiable settlement proceeds in petitioners' possession, as an appropriate equitable remedy within the ERISA enforcement scheme created by Congress.

An essential principle recognized by this Court in *Knudson* is (534 U.S., at 213; emphasis in original):

> "In contrast, a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. See 1 Dobbs § 4.3(1), at 587-588; Restatement of Restitution, *supra*, § 160, Comment *a*, at 641-642; 1 G. Palmer, Law of Restitution § 1.4, p. 17; § 3.7, p. 262 (1978)."

The core of the decision by the court of appeals in *Sereboff* is (407 F.3d, at 218-219):

> "We agree with the district court that, in this dispute, MAMSI's actions seeks restitution, as that term is used in *Knudson*, because MAMSI seeks to recover funds that are specifically identifiable, belong in good conscience to MAMSI, and are within the possession and control of the Sereboffs. First, the funds have not been dissipated, and they are specifically identifiable. . .. [T]he funds . . . can 'clearly be traced to particular funds' recovered in the California litigation. *Knudson*, 534 U.S. at 213, 122 S.Ct. 708.
>
> "Second, the disputed funds belong in good conscience to MAMSI. The Plan contains express,

> unambiguous reimbursement provisions according MAMSI the 'right to recover any payments' made to the Sereboffs by a third party. Third, the disputed funds are within the possession and control of the Sereboffs. . .."

Petitioners appear to concede the "belong in good conscience" issue and rest their argument on the "clearly be traced" issue. Pet.Br., at 17-27. Their argument includes (*id.*, at 19-22):

> "As explained by Professor Dobbs, in order to obtain a constructive trust or equitable lien, the ability to trace the plaintiff's funds is critical:
>
> > '[t]he plaintiff must trace his money or property to some particular funds or assets. Especially when the defendant has taken money, tracing is difficult. In such cases the plaintiff can often prove that the money was taken, but has difficulty in identifying that money with funds in the defendant's accounts. . .. ***If the tracing is incomplete, the rule that requires a res is invoked and the constructive trust is denied, with the result that the defendant is only a simple debtor.***'
>
> 1 Dobbs § 4.3(2), at 593 (emphasis added). . ..
>
> "In this case, MAMSI's claim is *not* for return of particular money that the Plan paid to the Sereboffs and that the Sereboffs still retain. There is absolutely no evidence in the record that any Plan money was ever paid to the Sereboffs, as opposed to providers of their medical services. . .. Moreover, any money that the Plan paid on behalf of the Sereboffs has already been spent on legitimate medical expenses. What MAMSI is seeking,

> therefore, is not the return of Plan money or profits from its use or exchange. Rather, MAMSI is seeking to recover new money paid out by third parties, the alleged tortfeasors.
>
> "The district court's assertion that the funds in question ''belong in good conscience to the Plan' (because the plain language of the plan indisputably requires reimbursement under the circumstances of the Sereboffs' tort claims arising out of the California accident)' is perhaps true as a matter of fairness. Mere fairness, however, is the wrong criteria by which to judge if a remedy was 'typically available in equity.' . . .
>
> "Whether or not funds 'belong in good conscience' to another, the ability to seek restitution of those funds - absent the tracing described above - was not 'typically available at equity.' See *Gaines* v. *Miller*, 111 U.S. 395, 397 (1884) (equitable relief denied, explaining: "Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received [citations omitted]. The remedy at law is adequate and complete."); 1 Dobbs § 4.1(1), at 556 (Restitution claims for money are usually claims 'at law.'). . . ."

The brief by the Association of Trial Lawyers of America ("ATLA") as *amicus curiae* includes essentially the same argument (at 9-10).

These arguments by petitioners and the ATLA overlook economic realities. Respondent offered, and petitioners accepted the bargain, that respondent would pay the injury-related medical expenses involved ($74,869.37) on condition that, pursuant to the terms of respondent's plan, petitioners would reimburse respondent from their ulti-

mate injury-related settlement proceeds ($750,000). The settlement proceeds ($750,000) resulted in part from, and included reimbursement for, all of the medical expenses involved ($74,869.37). Petitioners' settlement proceeds to that partial extent are the product of, and are traceable to, respondent's medical expense payments. A constructive trust upon identifiable and non-dissipated settlement proceeds is a typical equitable remedy to enforce reimbursement terms of the plan: "A constructive trust . . . is imposed as a remedy to prevent unjust enrichment." Restatement of Restitution § 160, Comment *a*, at 641 (1937), cited by this Court in *Knudson*, 534 U.S., at 213. An equitable lien is also a typical equitable remedy to prevent unjust enrichment, Restatement of Restitution § 161, Comment *a*, at 650, and "[w]here the equitable lien is on a fund, for example a bank deposit, it is enforced by a direction to pay the claimant out of the fund." *Id.*, Comment *b*, at 651. The judgment by the district court includes such a direction. *Sereboff*, 303 F.Supp.2d, at 696, 701-702. The equitable relief granted by the district court and affirmed by the court of appeals was a necessary remedy to prevent unjust enrichment.

Finally, the existence of a remedy in equity to transfer funds that are the product of litigation is firmly established by decisions of this Court. These include *Barnes* v. *Alexander*, 232 U.S. 117, 121 (1914) (in affirming the imposition of a lien upon litigation proceeds, the Court stated in part: "He promised only that if, when, and as soon as he should receive an identified fund, one third of it should go to the appellees. But he promised that. . .. And it is one of the familiar rules of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing."); and *Wylie* v. *Coxe*, 56 U.S. 415, 420 (1853) (". . . a contingent fee . . . out of the fund awarded . . . . being the

contract, it constituted a lien upon the fund . . .. under the contract the lien on the fund in the hands of the administrator, is a sufficient ground for an equity jurisdiction.") The award of equitable restitution to respondent from petitioners' settlement proceeds, to prevent unjust enrichment, is entirely consistent with Supreme Court precedent.

C. Petitioners' *make whole* arguments were not raised and considered in the court of appeals, are not included in the question on which certiorari was granted and are outside the scope of this Supreme Court review.

Petitioners' final point is entitled: "D. Even If It Constitutes 'Equitable Relief,' the Reimbursement Award Is Not 'Appropriate'." Pet. Br., at 30. The substance of that point includes (*id.*, at 34):

> ". . . [N]o determination has ever been made that any of the $750,000 recovered by the Sereboffs was compensation for past medical expenses that were paid by MAMSI and which, therefore, represent an unjust enrichment which has accrued to the Sereboffs.
>
> "The logic employed in granting the Reimbursement Award would permit plan fiduciaries to include provisions that authorize the reimbursement of all medical expenses paid on a beneficiary's behalf out of legitimate personal injury settlements, regardless of what these settlement payments were actually intended to compensate. This will have devastating consequences to those victims of catastrophic injury: 'In the vast majority of such cases, due to liability insurance policy limits or lack of resources, these victims will never recover from the tortfeasor a settlement which

> fully compensates them for their damages.' [Citation omitted.]
>
> "It strains credulity to suggest that such relief is 'appropriate.'"

Petitioners make no attempt to, and apparently cannot, reconcile these assertions with their concession that "[t]he district court's assertion that the funds in question ''belong in good conscience to the Plan' . . .' is perhaps true as a matter of fairness." Pet.Br., at 21.

Petitioners' final point represents a remarkable shift in their positions. The summary judgment for respondent in the district court was largely based upon the parties' stipulation ("Stip."), which is part of the district court's opinion. *Sereboff*, 303 F.Supp.2d 691, 696-701 (D.Md. 2004). Material parts of that stipulation include (*id.*, at 697-698, 700-701):

> "10. In connection with the injuries suffered by Defendant Marlene Sereboff, the Plan paid medical benefits on her behalf in the amount of $73,778.26. In connection with the injuries suffered by Defendant Joel Sereboff, the Plan paid medical benefits on his behalf in the amount of $1,091.11.
>
> "11. The Plan contains an acts of third parties provision, which states:
>
> > '. . . If you or your dependent receives benefits and have a right to recover damages from a third party, the Company is subrogated to this right. All recoveries from a third party (whether by lawsuit, settlement, or otherwise) must be used to reimburse the Company net of reasonable attorney fees and court costs prorated to reflect that portion of the total recovery which is due the Company for benefits

> paid. Any remainder will be yours or your dependents. The Company's share of the recovery will not be reduced because you or your dependent has not received the full damages claimed, unless the Company agrees in writing to a reduction. . . .'
>
> "12. On August 11, 2000, John Stein ('Stein'), the Sereboffs' attorney, filed a personal injury action in the Santa Clara County Superior Court on behalf of the Sereboffs. . . ."
>
> * * * * *
>
> "34. On January 23, 2003, the case settled as to all parties in favor of the Sereboffs' claims. All defendants paid $750,000. . . ."

In their petition for a writ of certiorari, petitioners state that the question presented to this Court is as follows (2005 WL 2072284, at i):

> "Can a plan fiduciary bring a civil action against a plan participant to obtain 'appropriate equitable relief' under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(3), where a term of the plan requires the participant to reimburse medical expenses advanced by the plan if the participant recovers money from a third-party tortfeasor and possesses such payments in an identifiable fund?"

The Court granted certiorari to review that question. *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 126 S.Ct. 735 (2005). Petitioners repeat that statement *verbatim* in their opening brief on the merits. 2006 WL 165865, at i.

Petitioners' *make whole* arguments, presented as a final point (Pet. Br., at 30-35), were not raised and considered in the court of appeals and are not included in the question

on which certiorari was granted. It is the settled practice of this Court, however, to decide cases on the grounds raised and considered in the court of appeals and included in the question on which certiorari is granted. *Owasso Independent School Dist. No. I-011* v. *Falvo*, 534 U.S. 426, 431 (2002). In addition, the circumstances here are not conducive to a decision whether or not to adopt an ERISA *make whole* rule and, if so, how it is to be fashioned. As the United States Court of Appeals for the Sixth Circuit observed in *Copeland Oaks* v. *Haupt*, 209 F.3d 811, 813 (6th Cir. 2000):

> "In *Marshall*, we adopted the so-called 'make whole' rule of federal common law, which requires that an insured be made whole before an insurer can enforce its right to subrogation under ERISA, unless there is a clear contractual provision to the contrary."

In the case at bar, respondent's plan clearly states that any right of petitioners to be *made whole* is superseded by respondent's rights to reimbursement (Stip., ¶ 11; 303 F.Supp.2d, at 698). No persuasive reason not to enforce respondent's plan as written has been presented.

CONCLUSION

The district court's award to respondent of equitable restitution from the specifically identifiable funds in the petitioners' possession is an appropriate equitable remedy within the ERISA enforcement scheme created by Congress. The decision by the court of appeals, affirming the district court's award of equitable relief, should be affirmed.

February 17, 2006.

Respectfully submitted,

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In the Supreme Court of the United States

JOEL SEREBOFF AND MARLENE SEREBOFF,
Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF SUBROGATION PROFESSIONALS IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

The National Association of Subrogation Professionals ["NASP"] respectfully submits this brief supporting the Respondent as *amicus curiae*. The parties have filed blanket letters of consent to the filing of amicus briefs with this Court.[1]

NASP is a non-profit trade association of insurance companies, third party administrators, subrogation specialists, and attorneys practicing in the field of subrogation and recovery. NASP has approximately 2,000 members, representing more than 150 insurance companies and self-funded entities. The purpose of NASP is to "create a national forum for the education, training, networking and sharing of information and, ultimately, the most effective pursuit of subrogation on an industry-wide basis."

Through NASP, members are able to retrieve, organize, exchange information, and expand the use of technology to promote subrogation efforts on a cost effective basis. The members of NASP recover hundreds of millions of dollars in health care expenditures every year for insured and self-funded employee benefit plans through subrogation and recovery practices.

NASP has an interest in the issues presented in this case – whether an employee benefit plan fiduciary is entitled to seek to the imposition of a constructive trust. The Court's decision will have a profound impact on employee benefit plans'

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[1] Counsel certifies pursuant to Rule 87.6 that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than *amicus curiae*, its members or counsel made a monetary contribution to the preparation or submission of this brief.

financial stability, which in turn will have far reaching implications for the nation's health care system.

SUMMARY OF THE ARGUMENT

The present action brought by MAMSI against the Sereboffs fits squarely within the parameters of "appropriate equitable relief" as set forth in ERISA §502(a)(3) as interpreted in *Great-West Life & Annuity Insurance v. Knudson*, 524 U.S. 204 (2002). MAMSI's action seeking to impose "equitable restitution" upon the tort recovery fund would have been allowed in courts of equity in the days of the divided bench. The lower court properly awarded this fund to the Plaintiff to whom it belongs in good conscience and in order to prevent unjust enrichment of the Sereboffs.

MAMSI's enforcement of a written employee benefit plan provision is proper under the statutory construction of §502(a)(3) which marries plan enforcement with "equitable relief". Under the civil enforcement section, MAMSI's action must seek equitable relief when seeking enforcement of its plan's terms.

MAMSI's action seeking return of the tort fund furthers the policy goals of ERISA to ensure enforcement of the written plan and conservation of plan assets. ERISA's civil enforcement section must be interpreted in a manner consistent with the policy goals of ensuring that funds are available to pay benefits to all participants.

ARGUMENT

I. THE RELIEF SOUGHT BY MAMSI WAS TYPICALLY AVAILABLE IN EQUITY

Some money claims are not "damages" representing the plaintiff's loss but "restitution" representing the defendant's unjust gains in a transaction." 1 D. Dobbs. §2.6(3), pg. 157. ERISA's reference to "equitable relief" evidences Congress' intent to limit such "equitable" restitution "to the forms of restitution traditionally available at equity." See *Knudson*, 534 U.S. at 216. Restitution at "equity" lies when a defendant takes possession of money, property or an intangible that in good conscience belongs to plaintiff. *Knudson*, 534 U.S. at 214. In *Knudson*, this Court gave ERISA fiduciaries a road map to follow in determining the scope and application of "other appropriate equitable relief" as found in 502(a)(3).

As set forth in *Knudson*, ERISA lawyers need to examine the Restatement of the Law of Restitution, Dobbs's Law of Remedies and G. Palmer's The Law of Restitution to discern the limits contained in 502(a)(3)'s reference to "equitable relief". Practitioners must not only formally plead remedies of "restitution" but also present the substantive operative facts required for application of the remedy by a court of "equity". This Court specifically limited 502(a)(3)'s "equitable relief" to *remedies* which could be awarded based upon the substantive facts by a court of equity in the days of the divided bench. See *Knudson*, 534 U.S. at 214. In this section, Amicus will present the substantive requirements for equitable "restitution" and analyze three forms of "equitable restitution" in light of the facts presented in this case.

Restitution can be either legal or equitable depending on the nature and character of the relief sought. Restitution, as an

equitable remedy, "measures the remedy by the defendant's gain and seeks to force disgorgement of that gain." 1 Dobbs §4.1(1), pg. 555. "[R]estitution is not damages: restitution is a restoration required to prevent unjust enrichment." *Id.* at pg. 557. The concept of "unjust enrichment" is the cornerstone of the American Restatement's approach to "restitution". Robert Goff and Gareth Jones, The Law of Restitution pg. 12 (Sweet & Maxwell 1966). Restitution becomes legal when a party seeks money damages for the loss created by the defendant. The legal or equitable nature of "restitution" as relief turns on the facts surrounding the relief being sought.

In the days of the divided bench, equity courts recognized four main types of equitable restitution. They are: (1) constructive trust, (2) equitable lien, (3) subrogation, and (4) accounting for profits. See, Restatement of Restitution §160 pg. 640; 1 Dobbs §4.3(1) pg. 587; See also, Goff pg. 39. Such "equitable" forms of restitution were sister remedies resembling various applications of the concept of constructive trust. Dobbs, *Id.* Restitution at equity was used by the courts to address "unjust enrichment" when a party possessed property, rights or money which in good conscience belonged to the plaintiff. See Goff pg. 38.

Equity courts required specific facts to be present before such remedies could be considered. Courts of equity required that property, money or right to an intangible be possessed by the defendant which in good conscience belongs to the plaintiff. *See Knudson*, pg. 213-214. For example, a court in equity could not attach a constructive trust upon a piece of property unless the property was in the "possession" of the defendant. Equity courts could not provide for subrogation unless an injured party actually possessed a right to seek redress from another individual or party.

Under ERISA's limitation, restitution at "equity" is characterized by the substantive nature of the relief and not the form of relief asserted by a plaintiff. See *Aetna Health Inc. v. Davila*, 542 U.S 200, 214-215 (2004) (substance over form in application of ERISA). The substance of the relief requires facts present that would allow an equity court during the day of the divided bench to award such relief. MAMSI's action, which seeks return of the settlement funds that belong in good conscience to plaintiff, satisfies the substantive nature of "equitable restitution" as required in *Knudson* and courts of equity.

A. Constructive Trust

The primary vehicle by which equity courts awarded "restitution" was through the imposition of a "constructive trust" on a possession, fund or right. A constructive trusts arises:

> Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.

Restatement of Restitution §160, pg. 640-641. Equity courts developed this restitution remedy to allow a plaintiff to recover the specific property such as a "bank account, or rights in an intangible". 1 Dobbs, §4.3(2) pg. 589. Application of the "constructive trust" requires the defendant to be in possession of an identifiable asset, fund or intangible which belongs in good conscience to the plaintiff. See Restatement of Restitution §160 comment (i), pg. 648; 1 Dobbs, §4.3(2) pp. 589, 591.

Equity's remedy of constructive trust results in an *in personam* order for transfer of the asset, intangible or fund to the plaintiff or one substituted for it. See 1 Dobbs, §4.3(2) pg. 590. Equity used "constructive trust" to compel a person to transfer ownership rights to plaintiff over the property, fund, right or substituted asset. Key to application of a constructive trust was the identifiable asset, fund or right possessed by the defendant.

The treatises make it clear that equitable restitution is not limited to return of exact property provided to defendant. In the case of a tort recovery, the property substituted for the medical bills advanced by the plan is the tort money received by the defendant. This substituted fund represents in part the money previously advanced for the defendant's medical care arising from the tort committed by another party. At the time of divided bench, a plaintiff could recover in constructive trust against a substituted fund as well as the original payment by the plaintiff. In fact, the substituted tort recovery includes payment for the medical bills previously paid by the Plaintiff plan for the Sereboffs' behalf. As with substituted property, plaintiff is entitled to a constructive trust on the substituted fund, namely the tort recovery by the Sereboffs, which represents recovery of the same medical bills previously paid by MAMSI. As employed by the courts, "[n]either remedy [constructive trust or equitable lien] is limited to cases of wrongdoing or dishonorable conduct by the defendant." See 1 Dobbs §4.3(3) pg. 602. In fact, a constructive trust was used to convey title in a fund or property to the party plaintiff to satisfy a debt. Unlike a legal action aimed at some violation of duty or law, this remedy seeks return of the asset, funds or intangible received by the defendant. *See Id.* §4.3(2) pg. 598. A court of equity employed the remedy of "constructive trust" to compel transfer of legal title or ownership in a fund to the party plaintiff.

The goal of a constructive trust is to put the plaintiff and defendant back in the position they would have been in prior to the acquisition of the property by the defendant. The Restatement characterizes this goal as follows:

> the result is to restore to the plaintiff property of which he has been unjustly deprived and to take from the defendant property the retention of which by him would result in a corresponding unjust enrichment of the defendant; in other words the effect is to prevent a loss to the plaintiff and a corresponding gain to the defendant;

See Restatement of Restitution §160 comment (d) pg. 643. The effect of a constructive trust is to transfer the fund, property or intangible to the plaintiff in order to prevent unjust enrichment of the defendant.

As explained by this Court in *Knudson*, the absence of a fund in the possession of the defendant prohibits "equitable" restitution from substantively being applied. In fact, the absence of the asset or fund made Great-West a simple creditor at law. See *Knudson*, 534 U.S. at 214. As this Court noted, an equity court could not impose a "constructive trust" as the funds in question were not in the possession of the defendant. Thus, the *Knudson* case must be characterized as legal "restitution" for breach of contract.

In contrast, the present action by MAMSI seeks return of an identifiable fund of money that the Defendants possess and that belongs in good conscience to the Plaintiff. As outlined by both lower courts, Defendants Sereboff agreed personally by stipulation to hold in an investment account $74,869.37 for the duration of this case. As in the days of the divided bench, Defendants possess a fund of money that belongs in good

conscience to the Plaintiff who previously advanced such expenses for Defendants. In order to prevent unjust enrichment, Plaintiff seeks ownership rights over this fund from Defendants. Based upon the facts, MAMSI did properly seek "equitable restitution" in accordance with 502(a)(3)'s limitations on relief.

Unlike *Knudson*, this case falls squarely within the substantive form of "equitable restitution" which is allowed under ERISA. MAMSI has proceeded against the Defendants who possess an identifiable fund of money on which an equity court could proceed *in personam* to order title to the fund transferred to Plaintiff. Moreover, the fund of money belongs to the plan as it represents compensation for medical bills of Defendants which Plaintiff previously advanced on the Sereboffs' behalf. Factually, the Plaintiff's complaint establishes the substantive elements of "equitable restitution" as required in the days of the divided bench and as set forth under ERISA through *Knudson*.

B. Equitable Lien

Equity courts developed an additional related restitution remedy called "equitable lien" which mirrors the constructive trust. An "equitable lien" provides the party plaintiff with a "charge against property" or lien The Restatement defines this remedy as follows:

> Where property of one person can by a proceeding in equity be reached by another as security for a claim on the ground that otherwise the former would be unjustly enriched, an equitable lien arises.

See Restatement of Restitution §161 pg. 650. This lien attaches to the asset, fund, intangible or property standing "as security

for the debt owed." See 1 Dobbs §4.3(3), pg. 600. Essentially, the difference between equitable lien and constructive trust is best described as the difference between a security interest and title to the asset. *Id.* pg. 603.

As with its sister remedy of constructive trust, equitable lien is imposed by a court of equity to prevent unjust enrichment of a defendant. Such a lien works in the same manner as the trust but provides the plaintiff with a more limited remedy. Instead of title to the fund, the court grants a lien that results in only a monetary payment and not the return of the asset. See 1 Dobbs §4.3(3) pg. 601. "Where the equitable lien is on a fund, for example a bank deposit, it is enforced by a direction to pay the claimant out of the fund." See Restatement of Restitution §161 comment (b) pg. 651.

Applying the Restatement to the present matter demonstrates the "equitable" nature of the remedy sought by MAMSI. In this case, the Plaintiff sought an order against the Sereboffs directing them to pay a fund over to the Plaintiff. This fund of money equals the amount of medical expenses advanced by the Plaintiff. As such, equity courts would attach a lien on the funds being held by the Defendants. As detailed in *Knudson*, ERISA's limitation on "equitable" relief is satisfied when the substantive nature of the relief is met. Factually, the present case meets the criteria for application of equity's lien upon the fund. As such, the relief sought by the Plaintiff is proper under 502(a)(3) as interpreted in *Knudson*.

C. Subrogation as Equitable Relief

In addition, the Restatement, Dobbs and Palmer recognize an additional claim of subrogation as an equitable remedy that can be awarded. The Restatement of Restitution defines subrogation as follows:

> Where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder.

See Restatement of Restitution §162, pg. 653. Like the previous "equitable" remedies, subrogation grants to the plaintiff restitution to prevent the unjust enrichment of the defendant whose debt was satisfied. *Id.* Restitution comes in the form of taking over the right to any recovery which can be had from a third party or received from a responsible individual. This Court has previously recognized subrogation as an equitable claim. See *United States v. California*, 507 U.S. 746, 757-758 (1993).

One of the most common examples of subrogation arises from an insurance company paying a claim for damages caused by a third party. See 1 Dobbs §4.3(4) pg. 605, George E. Palmer, The Law of Restitution Vol. IV §23.11 pg. 404 (Little Brown and Company 1978), Goff pg. 376, John Norton Pomeroy, A Treatise on Equity Jurisprudence 5th Ed., Vol. IV § 1419 pg. 1073 (Bancroft-Whitney Co. 1941). An insurer who pays a claim is entitled to restitution for the amounts paid which are recovered from the third party.

Subrogation as an "equitable" remedy traces its origins to maritime insurance decisions by equity courts of England. See *Randal v. Cockran*, 1 Ves. Sen. 98, 27 Eng. Rep. 916 (Ch 1748); See also, Palmer, §23.11 pg. 406-408. The Reporter's summary regarding the *Randal* decision states as follows:

> Insurer after satisfaction stands in the place of the assured as to the goods, salvage and restitution for what he paid.

See *Randal*, 27 Eng. Rep. 916.

In *Randal*, the insurer brought a bill claiming right to the proceeds received by its insured from the King's commission. This bill sought to have the proceeds transferred to the insurer instead of its injured insured. Lord Chancellor characterized this relief as "the plainest equity that could be." *Id.* When the insured recovers such proceeds, then the insurer is entitled to "restitution" of such proceeds.

A subrogated insurer is an "equitable assignee" entitled to "have the benefit of all securities which may at any time have been put into the creditor's hands by the principal debtor or which the creditor may have obtained." Pomeroy §1419 pg. 1072-1073. If an injured person recovers from the principal debtor (i.e. tortfeasor), she has an obligation at equity to transfer such recovery to the equitable assignee/subrogee such as the ERISA health plan. This transfer of securities, funds and goods represents restitution at equity to the insurer for the discharge of the obligation.

The Restatement of Restitution imposes such an obligation to pay "restitution" upon the person whose debts were satisfied. See Restatement of Restitution §162 comment (b) pg. 654-655. This restitution obligation to transfer goods or funds recovered is defined as follows:

> On the other hand, where the plaintiff is not officious, and he uses his property or his property is used in discharging the obligation of another or a lien upon another's property, he is entitled to reimbursement and

> is entitled to the remedy of subrogation to obtain reimbursement.

See Restatement of Restitution §162 (b), pg. 654-655. A subrogated insurer becomes the "equitable assignee" entitled to restitution from the responsible party or any funds placed in the hands of the injured party by the responsible party. This type of "restitution" prevents unjust enrichment of the injured party.

In the present case, MAMSI's action seeks just such "equitable restitution". Defendant Sereboff collected money from the principal debtor/tortfeasor for the amount previously advanced by the Plaintiff. At equity, Plaintiff is entitled to "restitution" from the Defendant as the Defendant's recovery would result in unjust enrichment. Such "restitution" represents the plainest of equities to prevent unjust enrichment of the Defendants.

II. THE RELIEF AWARDED TO MAMSI IS APPROPRIATE EQUITABLE RELIEF UNDER ERISA'S CIVIL ENFORCEMENT PROVISION

A. The Lower Court's Decision is Supported by this Court's Decisions in *Harris Trust* and *Knudson*

This Court's decision in *Harris Trust v. Salomon Brothers,* 530 U.S. 238 (2000) supports interpreting ERISA §502(a)(3) as: (1) providing a statutory cause of action to enforce Plan terms; and (2) allowing a plan to obtain equitable relief once it has proved the elements of the cause of action by establishing a violation of the applicable plan terms. In *Harris Trust,* this Court held that a plan fiduciary pursuing a cause of action under ERISA §502(a)(3)(B) was not required to establish that the *cause of action* was typically available. Instead, fiduciaries

are only required to establish that the *remedy* sought was typically available in equity.

The Petitioner attempts to recast MAMSI's cause of action as breach of contract. In doing so, the Petitioners jump to the baseless conclusion that no equitable relief is available to enforce the terms of a plan. This Court rejected a similar invitation to "tether" the cause of action to enforce plan terms with the remedy sought. Specifically, this Court held that "we reject Salomon's unsupported suggestion that remedial principles of common law are tethered to the precise contours of common law duty." *Harris Trust,* 530 U.S. at 252.

As noted in *Harris*, Congress joined equitable relief with enforcement of a written plan. It is Congress who joined plan enforcement with equitable relief when creating ERISA. In *Knudson*, this Court again specifically noted that Congress chose to limit relief in plan enforcement to "equity". As established in *Harris Trust* and *Knudson*, the nature of the relief sought and not the cause of action determine the proper character of the action. Any approach which looks only at the genesis of the claim and not the character of the "relief" sought fails to follow this Court's announced precedent.

B. The Majority of Circuits Have Correctly Interpreted *Knudson* By Holding That The Imposition of a Constructive Trust Is Appropriate Equitable Relief Under ERISA

Under the rationale in *Knudson* and *Harris Trust,* the Fourth Circuit's analysis is consistent with the analysis of the Fifth, Seventh, Eighth, and Tenth Circuits.[2] All of these courts

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[2] *North Am. Coal Corp. Retirement Savings Plan v. Roth*, 395 F.3d 916 (8th Cir. 2005), *cert. denied* 126 S.Ct. 145 (2005); *Admin.*

correctly held that relief, similar to what MAMSI obtained, is equitable in nature. Equity provides restitution when sought to recover specifically identifiable funds that were in the constructive possession and control of the defendant. Such restitution seeks to return funds which belong to the Plan pursuant to the plan terms.

The majority of circuits correctly interpreted *Knudson's* description of "equitable relief". In *Knudson,* Plaintiff Great-West had asked the Court to recognize the rights of ERISA plans and their fiduciaries to file suit in federal court to enforce reimbursement provisions. This Court agreed so long as the monies over which the plan fiduciary seeks restitution or constructive trust are being held by the defendant:

> In contrast, plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, *where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession*. [citations omitted]. A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, *in the eyes of equity*, the true owner. But where "the property [sought to be recovered] or its proceeds have been dissipated so that no product

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Comm. of the Wal-Mart Assocs. Health and Welfare Plan v. Willard, 393 F.3d 1119 (10th Cir. 2004); *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot and Wansbrough*, 354 F.3d 348 (5th Cir. 2003), *cert. denied*, 541 U.S. 1072 (2004); *Admin. Comm. of the Wal-Mart Stores, Inc. Assocs. Health and Welfare Plan v. Varco*, 338 F.3d 680 (7th Cir. 2003), *cert. denied*, 542 U.S. 945 (2004).

> remains, [the plaintiff's] claim is only that of a general creditor," and the plaintiff "cannot enforce a constructive trust or an equitable lien upon other property of the [defendant]." Restatement of Restitution, *supra*, 215, Comment *a*, at 867. Thus for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

Knudson, 534 U.S. at 213, 214 (emphasis added). ERISA reimbursement enforcement is proper when restitution lies in "equity" meaning the defendant possesses funds belonging in good conscience to the plan.

In the present case, MAMSI sought only to restore to the Plan particular funds in the Sereboffs' possession that in good conscience belong to the Plan. This is the essence of the equitable remedy of restitution as announced in *Knudson*. See Also *B.P. Amoco Corp. v. Connell*, 320 F. Supp. 2d 1368, 1371-72 (M.D. Ga. 2004). MAMSI seeks "equitable" restitution as it seeks return of the unjust gains obtained by the Sereboffs. The majority interpretation of *Knudson* clearly allows for ERISA enforcement and gives full meaning to "equitable relief".

C. Equitable Relief To Enforce the Terms of an ERISA Plan Is Clearly Contemplated in ERISA's Remedial Scheme

The Sixth Circuit's analysis in *Qualchoice* is also contrary to the plain provisions of ERISA's civil enforcement scheme. Under the Sixth Circuit's analysis, there would never be "appropriate equitable relief" to enforce the terms of an ERISA plan because the plan is similar to a contract. Nevertheless,

§502(a)(3) provides that plan fiduciaries, participants and beneficiaries may bring a civil action: (1) to enjoin any act or practice that violates ERISA or the terms of the plan; and (2) to seek *"other appropriate equitable relief" to enforce* the provisions of ERISA or *the terms of the plan*. Thus, Congress clearly contemplated that there would be some forms of equitable relief, other than injunctions, available to enforce the terms of an ERISA plan. The Sixth Circuit's view violates the rule against superfluities as outlined by this Court in *Hibbs v. Winn*, 542 U.S. 88 (2004)("A statute should be construed so that effect is given to all provisions, so that no part will be inoperative, or superfluous, void, or insignificant...)(citing 2A N. Singer, Statutes and Statutory Construction §46.06 pp. 181-86, rev. 6th ed. 2000). This minority view fails to appreciate that Congress joined equitable relief with plan enforcement.

The minority approach incorrectly defines "equitable relief" by limiting the examination to the cause of action. The minority view fails to follow the direction set forth in *Knudson* to examine the nature of the relief. Instead, the Sixth Circuit defines the remedy by the cause of action without looking at the nature of the relief sought. Such an approach renders ERISA's civil enforcement section superfluous in violation of this Court's precedent.

III. PUBLIC POLICY SUPPORTS ENFORCEMENT OF SUBROGATION AND REIMBURSEMENT PROVISIONS

Congress enacted ERISA to provide national uniformity and solvency for business-provided health and welfare plans. Congress's intent under ERISA was to (1) provide for national uniformity through enforcement of written plans, and (2) to secure preservation of plan assets. Enforcement of subrogation and reimbursement provisions helps accomplish Congress's intended goals.

A. Enforcement of Subrogation and Reimbursement Provisions Keeps Health Care Coverage Affordable

The Supreme Court has previously found that plan asset protection was of critical importance in the policy underlying the creation of ERISA. Specifically, this Court has stated that:

> A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary.

Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142 (1985). Enforcement of written plan reimbursement provisions provides for the protection of all plan participants through preservation of the plan's assets. Pursuant to this Court's analysis in *Russell*, such a remedy protects the entire plan and preserves assets as intended by Congress.

The importance of subrogation and reimbursement, as a mechanism to preserve plan assets, can hardly be disputed. In an era of rising health care expenses, cost control mechanisms are critical to the ability of plans to keep premiums affordable. Health plans rely heavily upon subrogation and reimbursement for that purpose. For example, Trover Solutions, the nation's largest healthcare subrogation/recovery vendor, reports that it has recovered more than $1 billion for its health plan clients over the past five years. Elimination of these recoveries would make health care coverage, which is already difficult for many Americans to afford, even more expensive. The Maryland General Assembly, for instance, has estimated that health insurance premiums for state workers would rise between 1% and 2% if insurers' ability to enforce subrogation and

reimbursement provisions were eliminated.[3] For every 1% increase in premiums there are 300,000 Americans that can no longer afford health coverage. *See* Health Economics Practice Barents Group, LLC, "Impact of Legislation Affecting Managed Care Consumers: 1999-2003" (April 21, 1998)(Prepared for the American Associations of Health Plans).

The primary purpose of health coverage is not to pay for expenses caused by a third party's tortious conduct, but rather to pay for illness or injury not caused by the fault of anyone. When health plan dollars come from a limited fund, the rights of subrogation and reimbursement are important to the financial stability of those plans. What public policy requires the health plan and its non-injured participants to bear the financial loss for an auto accident injury when the ERISA plan provides otherwise? This Court should not force health insurers and health plans to become the uninsured motorist, disability and other loss insurers for all citizens who choose not to purchase sufficient insurance for their own protection.

An inability to enforce subrogation or reimbursement provisions under ERISA would impact the premiums charged employers and their employees for such coverage. It is necessary to understand how rates are set for health plans.[4]

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[3] "Fiscal Note" at http://mlis.state.md.us/200rs/billfile/SB0903.htm

[4] "Insurance companies can take subrogation into account in setting their rates, at least in setting health insurance rates....An insurance company sets its rates based on historical net costs. Thus, if the insurer had one hundred policyholders in the experience period, and experienced a total of $ 20,000 in claim costs, it will set its actuarial premiums at $ 200 per policy holder. If, on the other hand, the insurance company experienced $ 20,000 in claim costs and received $ 5,000 in subrogation, it will set its actuarial premiums at $ 150 per

Because the primary goal of a health plan is to spread risk among its various members, plans use historical evidence or actual experience data in setting the rates for a given group. When one member of the group incurs a large loss that goes unreimbursed, the effect of the loss will be passed on to the other members of the group via higher rates and premiums.

The risk bearer should be determined by who is in the best position to insure against a risk of loss from an accident or third party claim. Several commentators and experts in law and economics, applying optimal risk bearing rationales, have concluded that the individual group member is in the best position to bear the risk.[5] This is because individual members

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policy holder. Thus, whether the insurer lists subrogation as a factor in its actuarial calculations is irrelevant; it is implicitly included." See Jeffrey A. Greenblatt, *Insurance and Subrogation: Where the Pie Isn't Big Enough, Who Eats Last?* 64 U. Chi. L. Rev. 1337, 1355 (1997) citing Harry L. Sutton, Jr. and Allen J. Sorbo, *Actuarial Issues in the Fee-For-Service/Prepaid Medical Group* 46 (Center for Research in Ambulatory Healthcare Admin 2d ed 1993) ("An adjustment to estimated total HMO expenses ... should be included to project the impact of coordination of benefits, workers' compensation, and subrogation.") and author's Phone Interview and Letter from Dean K. Lamb, Senior Actuary for Allstate Insurance Company, to Jeffrey A. Greenblatt, Jan 30, 1997 ("Lamb letter") (on file with U. Chi. L. Rev).

[5] After employing a mathematical model, one professor notes that "[t]he made-whole doctrine seems seriously at odds with sound policy. The analysis here suggests that the opposite rule--that the insurer should be made whole first--will be best for insureds except when the insured is unable to purchase efficient amounts of insurance coverage." See Alan O. Sykes, *Subrogation and Insolvency* vol. 30 Journal of Legal Studies 383, 396 (2001). Further it is more efficient for the insured to bear the risk for three reasons. "First, it better tracks the risk preferences of the parties. Second, it places the

of a health plan can insure themselves for catastrophic or fatal injury through the purchase of uninsured/underinsured motorist insurance, life insurance, and accident and disability insurance.

B. Enforcement of Subrogation and Reimbursement Provisions Prevents Double Recovery on the Part of Tort Claimants

Enforcement of subrogation and reimbursement provisions prevents injured participants from recovering medical expenses twice: once from the health plan who paid the medical expenses, and once from the responsible party through a tort claim. Recovery to the plan not only prevents a windfall to one participant but ensures sufficient assets exists to pay medical claims for other plan participants who may suffer heart attacks, strokes, cancer or other significant medical claims not caused by another person or entity.

Double recovery to the injured party occurs by virtue of receiving compensation for accident medical expenses from two separate sources. The first recovery occurs when an injured party has accident related medical expenses paid by a health plan. The second recovery occurs when the injured party receives compensation for those same medical expenses from the tortfeasor. Contrary to the assertions of the amicus curiae supporting the Petitioners, the fact that the insured pays a premium does not impact the double recovery analysis. The plan participant pays premiums for, and is entitled to, only

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incentive to achieve the last dollar of recovery from a tortfeasor on the party whose efforts matter most in achieving it: the insured. Finally, it avoids the definitional problems of the made-whole doctrine and the time and effort of a mini-trial." See Jeffrey A. Greenblatt, *Insurance and Subrogation: Where the Pie Isn't Big Enough, Who Eats Last?* 64 U. Chi. L. Rev. 1337, 1366 (1997).

those benefits provided for in the policy. When the health plan contains a subrogation or reimbursement provision, all benefits are payable subject to those provisions. If the subrogation or reimbursement provision is held unenforceable, then the participant will unjustly profit by receiving more coverage than was anticipated under the plan.

The equitable principle of subrogation was designed to prevent this type of double recovery. See *Sunbeam-Oster Co. Group Benefit Plan v. Whitehurst*, 102 F.2d 1368, 1376 n. 24 (5th Cir. 1996)("Recognition and enforcement of a right of subrogation for health insures is primarily premised on precluding double recoveries.") Without subrogation, plan participants would recover twice for the same expenses and thus would be left financially better off than if no accident had occurred. See *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293, 1298 (7th Cir. 1993). Public policy disfavors double recovery because it encourages the insured to suffer the very type of loss that is being insured against.

Most states allow a tort claimant to recover the full amount billed by the medical provider though many times the health plans pay the provider a lower negotiated rate. As such, most tort claimants already recover more for medical expenses than the amount subrogated by the health plan. If reimbursement is prohibited, then plan participants will not only get the benefit of the health plan's negotiated rate, they get to keep 100% of the amount recovered for medical expenses even though they never personally paid any amount for such expenses. Public policy favors that the amount paid by the plan to the providers be returned for the benefit of all plan participants and beneficiaries.

C. Elimination of Subrogation and Reimbursement Remedies Is Not Necessary to Protect Severely Injured Plan Participants

The amicus supporting the Petitioners makes unfounded claims that the vast majority of tort actions result in settlements inadequate to compensate the plan participant's losses. In support of this argument, the amicus cites two anecdotal cases in which it maintains that enforcement of subrogation provisions led to harsh results for severely injured plan participants. The amicus asks this Court to interpret ERISA in such a way as to eliminate the equitable relief provided to plan fiduciaries in order to prevent what it considers the unfair application of subrogation.

At best, the amicus's attempt to paint such cases as representing the typical subrogation claim is misleading. NASP members report that the average healthcare subrogation claim falls in the $6,000 - $8,000 range. Contrary to the contention of the Petitioners' amicus, claims with such minor medical payments often settle within the available insurance limits. Therefore, in most cases, there exists ample insurance coverage with which to fully compensate the injured plan participant.

Those few instances where there are insufficient third party funds available do not justify this Court's adoption of a tortured interpretation of ERISA's remedial scheme. This is because states are free to enact insurance regulations that would eliminate or limit an insurer's right to subrogation in cases of inadequate compensation. In fact, many states have adopted the make-whole doctrine by common law or statute. The make-whole doctrine, in its purest form, prohibits the enforcement of subrogation or reimbursement provisions until the insured has received full compensation for his or her loss.

To the extent that such laws regulate the insurance industry, they are saved from preemption and will apply to the large majority of employee benefit plans funded through insurance. ERISA §514.

State make-whole laws are preempted when applied to employee benefit plans funded through a trust or through the general assets of the employer. *FMC Corp. v. Holliday*, 498 U.S. 52 (1990). Nevertheless, funds recovered on behalf of these "self-funded plans" go directly back into the trust for the benefit of all participants and beneficiaries. For self-funded plans, the balance of the equities weighs in favor of subrogation regardless of whether the plan participant has been fully compensated. Accordingly, most federal jurisdictions apply the make-whole doctrine only as a default rule in absence of clear plan provisions to the contrary. *See Cagle v. Bruner*, 112 F.3d 1510 (11th Cir. 1997); *Copeland Oaks v. Haupt*, 209 F.3d 811 (6th Cir. 2000); *Barnes v. Independent Auto Dealers of California Health Welfare Benefit Plan*, 64 F.3d 1389 (9th Cir. 1996).

In most cases, the third party recovery is adequate to fully compensate the injured plan participant. When there is not adequate compensation, state insurance regulations and federal common law govern how the available funds will be divided. Accordingly, the issue of full compensation should not be considered when examining the scope of ERISA's remedial scheme.

D. State Laws Modifying the Collateral Source Rule Support the Enforcement of Health Plan Subrogation and Reimbursement Provisions

The common law collateral source rule requires tortfeasors to compensate prevailing plaintiffs for medical expenses

regardless of whether those expenses were paid by a collateral source, such as a health plan. Many states have modified this rule to require that tort judgments be reduced by the amount of collateral source payments, unless the collateral source has a right of subrogation or reimbursement. *Alaska Stat.* § 09.17.070(a); *Colo. Rev. Stat. Ann.* § 13-21-111.6; *Conn. Gen. Stat. Ann.* §52-225a; *Fla. Stat. Ann.* § 768.76(1); *Haw. Rev. Stat.* §633-10; *Idaho Code* § 6-1606; 735 *Ill. Comp. Stat.* 5/2-1205.1; *Me. Rev. Stat. Ann.* 24, §2906; *Mich. Comp. Laws Ann.* §600.6303; *Minn. Stat. Ann.* §548.36; *Mont. Code Ann.* §27-1-308; *Ohio Rev. Code* § 2315.20; *Utah Code Ann.* §78-14-4.5 (1953). Public policy so favors the prevention of double recovery that these states enacted statutes to prevent a plaintiff from obtaining a double recovery even in those instances where the collateral source payor lacks the right of subrogation or reimbursement. In these states, tortfeasors --not individual plan participants-- will benefit from the abolishment of health plan subrogation remedies.

E. Enforcement of Subrogation and Reimbursement Provisions Promotes the Coverage and Early Payment of Medical Claims

In addition to subrogation and reimbursement provisions, many employee benefit plans contain provisions that exclude from coverage any expense that is also payable under liability or automobile insurance. Plans typically agree to advance benefits for accident-related medical expenses if the participant acknowledges the plan's right of subrogation and reimbursement. This practice allows the participant's medical expenses to be paid prior to the determination of the tortfeasor's liability or the valuation of the injured participant's damages. If denied the right to enforce their subrogation and reimbursement provisions, health plans are likely to refuse to advance benefits to their members for injuries caused by third

party liability – thereby potentially restricting an injured participant's access to medical care. In this scenario, injured participants may be forced to settle their tort claims quickly, and for less money, in order to pay for necessary medical treatment. Thus, the absence of subrogation and reimbursement remedies would be to the detriment of injured participants.

CONCLUSION

For these reasons, the Court should affirm the judgment of the court of appeals.

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IN THE

Supreme Court of the United States

JOEL SEREBOFF AND MARLENE SEREBOFF,
Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF RESPONDENT

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IN THE

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No. 05-260

JOEL SEREBOFF AND MARLENE SEREBOFF,
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v.

MID ATLANTIC MEDICAL SERVICES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF RESPONDENT

IDENTITY AND INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The National Coordinating Committee for Multiemployer Plans ("NCCMP") is a nonprofit, tax-exempt organization that has participated for over a quarter of a century in the development of the law applicable to employee benefit plans.[1] The NCCMP's primary purposes are to assure an

[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby state that no counsel for Petitioners or Respondent authored any part of this brief. Moreover, no person or entity other than the NCCMP

environment in which multiemployer plans can continue their vital role in providing medical, pension and other benefits to working men and women, and to participate in the development of sound employee benefits legislation, regulations and policy affecting benefit plans.

The NCCMP is the only national organization devoted exclusively to protecting the interests of multiemployer plans by advocating on behalf of these plans in Congress, in the courts and in the regulatory process. Multiemployer plans provide benefits to tens of millions of American workers. Hundreds of multiemployer plans and related organizations, with a nationwide participant base located across the United States, are affiliated with the NCCMP. The plans affiliated with the NCCMP represent a majority of the participants in multiemployer plans throughout the nation and are representative of the multiemployer plan community generally. Affiliated plans are active in every major segment of the multiemployer plan universe, including the airline, building and construction, entertainment, food production, distribution and retail sales, health care, hospitality, mining, maritime, industrial fabrication, service, textile and trucking industries.

Because of this broad range of experience of the NCCMP's constituent organizations, the NCCMP believes that it is uniquely qualified to state the position of the trustees of such plans. The NCCMP and its constituent groups have a strong interest in supporting the decision below, to ensure that multiemployer plans continue to have an effective, efficient and uniform equitable remedy available to them in the federal courts to recover amounts due to the plans. Both Petitioners and Respondent have consented to the filing of this amicus brief, as is evidenced by letters of consent that have been filed with the Court.

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made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

The Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), has had a devastating effect on benefit plans in general, and on health benefit plans in particular. Prior to the Court's decision in *Great-West*, beneficiaries routinely, and voluntarily, agreed on how and under what conditions they would satisfy a benefit plan's equitable right to a share of payments received from responsible tortfeasors. The vast majority of third party recovery cases were resolved efficiently and fairly. In the rare case when there was a disagreement over the amount or fairness of the reimbursement demanded, the beneficiary and the benefit plan could negotiate a mutually agreeable resolution, or if no agreement could be reached, request that the federal courts resolve the matter in a uniform manner. The federal courts proved to be very responsive to claims by beneficiaries that benefit plans were unfairly asserting an equitable right, and created appropriate safeguards. *See, e.g., Cagle v. Bruner*, 112 F.3d 1510, 1520-21 (11th Cir. 1997) (applying make-whole doctrine as a default interpretive principle to reduce reimbursement rights); *Waller v. Hormel Foods Corp.*, 120 F.3d 138, 141 (8th Cir. 1987) (recognizing common fund doctrine to reduce reimbursement rights).

After *Great-West*, beneficiaries, like the Sereboffs in this case, would accept health benefits from plans and then adopt a "come and get us if you can" response to the legitimate assertion that a benefit plan had an equitable claim to a share of payments recovered from third parties. Enforcing an equitable right to reimbursement has become increasingly complex and expensive for benefit plans because many beneficiaries simply refuse to honor the obligation to reimburse benefit plans. The NCCMP submits this brief to urge the Court to affirm the decision below, and leave to multiemployer plans the remaining narrow, but extremely

important, equitable remedy under § 502(a)(3) of the Employee Retirement Income Security Act of 1974. 29 U.S.C. § 1132(a)(3).

SUMMARY OF THE ARGUMENT

The Court of Appeals properly held that Mid Atlantic's equitable claim for constructive trust or equitable lien under § 502(a)(3) of ERISA was proper because it sought to enforce the terms of its plan through a remedy that has traditionally been available in equity. The settlement funds in dispute were specifically identifiable, belonged in good conscience to Mid Atlantic, and were still within the possession of the Sereboffs. The lower court's decision, therefore, followed the Court's holding in *Great-West* and should be affirmed. The narrow equitable remedy asserted by Mid Atlantic is crucial for benefit plans to obtain a portion of payments that rightfully belong to the plans in a wide range of contexts. The lower court's decision also has the effect of protecting valuable medical benefits provided to beneficiaries, which will be lost if plans have no effective method to assert their equitable reimbursement rights. Finally, the decision below also recognizes Congress's objective in enacting ERISA to spare benefit plans the needless additional expense and uncertainty of state court remedies.

ARGUMENT

I. RECOVERY FROM THIRD PARTY LIABILITY PAYMENTS IS NOT THE ONLY CIRCUMSTANCE IN WHICH A RESTRICTION OF AVAILABLE REMEDIES WILL OPERATE TO HARM BENEFIT PLANS.

The Petitioners and Amicus Association of Trial Lawyers of America place the question presented to the Court exclusively in the context of reimbursement and subrogation from payments obtained from tortfeasors. Reimbursement

claims are characterized as leading to "devastating consequences" or "harsh results." Pet'r Br. at 34; Br. of Amicus Curiae the Ass'n of Trial Lawyers of America at 17-19. These extreme characterizations overlook the facts presented by the Petitioners' own third party recovery at issue in this case: Petitioners recovered $750,000.00 from the responsible tortfeasors and Mid Atlantic claimed an equitable right to a share of that recovery in the amount of $74,869.37. *Mid At. Med. Servs, LLC v. Sereboff*, 407 F.3d 212, 214-215 (4th Cir. 2005.) Reimbursement under the facts presented in this case can hardly be characterized as "devastating" or "harsh." In any event, a narrow equitable remedy of a constructive trust or equitable lien is necessary for benefit plans to obtain recoveries in all kinds of situations, not just reimbursement and subrogation.

A. An equitable remedy is necessary for all types of recoveries, not only subrogation and reimbursement.

The Petitioners' exclusive focus on reimbursement and subrogation overlooks the broader impact the Court's ruling will have on the orderly administration of benefit plans. In addition to reimbursement claims involving payments from responsible tortfeasors, benefit plans of all kinds, medical and pension, encounter situations where money must be recovered in equity. Overpayments from benefit plans can occur in a myriad of factual scenarios. For example, a benefit plan paying a death benefit may mistakenly pay the wrong individual, or a payment may be obtained by an individual through fraud. Commonly, a pension benefit plan is not notified immediately of a pensioner's death and that benefits should be discontinued. As a result, monthly pension benefit payments are erroneously deposited electronically into the deceased pensioner's account. Sometimes, a benefit plan simply miscalculates the amount of a benefit, and overpays a participant or beneficiary in error. In all of these situations,

benefit plans must have an equitable right to recover the overpayment from funds held by the beneficiary.

Prior to the Court's decision in *Great-West*, the lower federal courts had no difficulty creating an unjust enrichment remedy as part of federal common law, permitting benefit plans to seek restitution against third parties who wrongfully or mistakenly received money from an ERISA plan. *See, e.g., Heller v. Fortis Benefits Ins. Co.*, 142 F.3d 487, 495 (D.C. Cir. 1998); *Luby v. Teamsters Health, Welfare & Pension Trust Funds*, 944 F.2d 1176, 1186 (3rd Cir. 1991); *Blue Cross & Blue Shield of Ala. v. Weitz*, 913 F. 2d 1544, 1548-49 (11th Cir. 1990); *Provident Life & Accident Ins. Co. v. Waller*, 906 F. 2d 985, 994 (4th Cir. 1990). After the Court's decision in *Great-West*, however, the lower courts began to question whether an ERISA benefit plan could sue under § 502(a)(3) to recover benefits in any context. *See, e.g., Coop. Benefit Administrators, Inc. v. Ogden*, 367 F.3d 323 (5th Cir. 2004) (holding benefit plan had no remedy under § 502(a)(3) to recover pension benefits advanced to participant waiting for social security disability payments to begin); *Honolulu Joint Apprenticeship & Training Comm. v. Foster*, 332 F.3d 1234 (9th Cir. 2003) (holding benefit plan had no remedy under § 502(a)(3) to recover costs of apprenticeship training); *Trustees of the AFTRA Health Fund v. Biondi*, 303 F.3d 765, 771 (7th Cir. 2002) (noting district court's dismissal of benefit plan's action under § 502(a)(3) to recover fraudulently obtained benefit payments). The very narrow equitable remedy of constructive trust or an equitable lien as permitted by the court below is vital to benefit plans in any context in which they must recover plan assets from third parties.

B. Hardships caused by state legislation or incomplete remedies are not the necessary result of benefit plans' reimbursement and subrogation provisions.

The Petitioners' and Amicus Curiae in Support of Petitioners' characterization of benefit plans' equitable reimbursement remedies as harsh and unfair overlooks the "commonplace economic calculus" present in every personal injury lawsuit. *Kress v. Food Employers Labor Relations Ass'n & United Food & Commercial Workers Health & Welfare Fund*, 391 F.3d 563, 570 (4th Cir. 2004). According to the Fourth Circuit:

> Attorneys considering taking a case on contingency commonly factor the likelihood of success and the magnitude of recovery into their decision. Many tort claims involve considerable risk and insufficient reward. Attorneys, however, carefully screen these claims and reject a large portion, including most denominated as high risk. . . . If the participant and his attorney conclude that private litigation will not produce a sufficient recovery to make the litigation worthwhile, they need not bring the case.

Id. (citation and quotation omitted.) Thus, harsh results are not caused by benefit plans enforcing a right to reimbursement and subrogation. Instead the "unfairness" is often an inherent part of the litigation process which has been described, in this context, as being "like a lottery ticket." *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293, 1294 (7th Cir. 1993). In fact, far from creating hardships, the availability of subrogation and reimbursement serves to shift the risk of an uncertain recovery onto the *benefit plan* and away from the beneficiary. *Id.* at 1297. This is because by advancing medical benefits to the beneficiary in anticipation of a possible equitable claim to proceeds obtained in the future, the "lottery ticket" of uncertain payment for medical expenses

is transferred from the beneficiary to the benefit plan. *Id.* at 1298.

II. THE DECISION BELOW PROTECTS BENEFICIARIES' ABILITY TO OBTAIN IMMEDIATE MEDICAL BENEFITS WHEN INJURIES ARE CAUSED BY THIRD PARTIES.

Self-funded multiemployer benefit plans are not obligated by any law to pay medical benefits when a beneficiary is injured by a third party. The result of the position advanced by Petitioners eliminating benefit plans' ability to enforce equitable claims to a portion of compensation received by tort victims will be to discourage the payment of such benefits. Thus, beneficiaries will be left with no medical benefit coverage at a time when they need it most, after an unexpected accident caused by a tortfeasor.

Although ERISA establishes a comprehensive regulatory scheme for benefit plans in general, it does not mandate any minimum substantive content for welfare benefit plans in particular. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983); *Hamilton v. Air Jamaica, Ltd.*, 945 F.2d 74, 78 (3rd Cir. 1991). As a result, employers "have large leeway to design disability and other welfare plans as they see fit." *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003). In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985), the Court held that ERISA "does not regulate the substantive content of welfare-benefit plans." ERISA generally leaves it to plan sponsors "to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995); *see also Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981).

The vast majority of multi-employer plans affiliated with the NCCMP have not agreed to pay medical benefits for injuries caused by third parties. The written plans commonly provide that benefits are not payable if a sickness or injury is

the responsibility of a third party. However, recognizing the need of beneficiaries to pay for extraordinary medical expenses in the event of unexpected sickness and injuries, benefit plans often agree to advance benefits. That advance, however, is conditioned on the beneficiary's promise to honor the benefit plan's equitable right to a portion of compensation if and when the beneficiary obtains compensation from the responsible third party. *See, e.g. Kress*, 391 F.3d at 565 (plan refused to pay benefits for injuries from auto accident when beneficiary refused to acknowledge equitable reimbursement right); *Copeland Oaks Employee Benefit Plan v. Haupt*, 209 F.3d 811, 812 (6th Cir. 2000) (same); *Cagle v. Bruner*, 112 F.3d 1510, 1513 (11th Cir. 1997) (same).

The terms of a typical plan of benefits are illustrated by the plan considered by the Fourth Circuit in *Kress*:

> Waiting for a third party to pay for these injuries may be difficult. Recovery from a third party can take a long time (you may have to go to court), and your creditors will not wait patiently. Because of this, as a service to you, the Fund will pay your (or your eligible dependent's) expenses based on the understanding that you are required to reimburse the Fund in full from any recovery you or your eligible dependent may receive, no matter how it is characterized. This process is called "subrogation." . . . . The Fund extends benefits to you and your dependents only as service to you. The Fund must be reimbursed if you obtain any recovery from another person or entity's insurance coverage.

Kress, 391 F. 3d at 566. Thus, far from having contracted to bear the risk associated with the costs of injuries caused by third parties, benefit plans typically expressly disavow any obligation to pay benefits under those circumstances.[2]

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[2] Amicus American Trial Lawyers Association argues that restricting benefit plans' ability to enforce subrogation provisions is appropriate because beneficiaries are merely receiving the benefits to which they are

However, recognizing the difficult circumstances presented to beneficiaries, benefit plans typically agree to advance medical costs to tide over beneficiaries in difficult times, *but only if* the beneficiary promises to reimburse the benefit plan later. As emphasized by the Fourth Circuit, these plan provisions

> broadened rather than narrowed the options of Fund participants. Nothing required [the beneficiary] to accept the subrogation option; he was free to reject it and commence litigation at once, with no obligations whatever to the Fund. But if he did accept the Fund's offer, and then recovered in tort, it was not wrongful for the Fund to seek to recoup this expenditure to provide for future participants who may find themselves in similarly straitened circumstances. The Fund "must serve the best interests of all Plan beneficiaries, not just the best interest of one potential beneficiary."

Kress, 391 F.3d at 570-71 (footnote omitted) (*quoting Ellis v. Metro. Life Ins. Co.*, 126 F.3d 228, 234 (4th Cir. 1997)). It is the voluntary nature of these advanced payments that clearly establishes the need for an *equitable* remedy of reimbursement, as opposed to the legal remedy of a breach of contract.

If the Court further restricts benefit plans' ability to obtain a constructive trust or equitable lien under these circumstances, as argued by Petitioners, the result will not be a greater recovery by beneficiaries in personal injury lawsuits. Instead, benefit plans likely will respond by simply not ad-

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contractually entitled in the first place. Amicus Br. at 25-26. Thus, according to Amicus, because benefit plans have "accepted payment for coverage of the beneficiary's medical expenses," there is no policy justification to require beneficiaries to reimburse medical plans out of tort recoveries from third parties. Amicus Br. at 31-32. As detailed by the plan language quoted above, this argument ignores that many benefit plans do not, in fact, contract to bear the risk to pay medical benefits when injuries or a sickness are caused by a third party.

vancing these payments in the first place, leaving beneficiaries to deal with medical bills, creditors and delays on their own through the uncertain and lengthy process of personal injury lawsuits. This cannot be good public policy.

Eliminating benefit plans' equitable remedies as argued by Petitioner will create hardship for the beneficiaries in another form as well. Currently, as described above, plans typically advance benefits to beneficiaries in their time of need, based on a promise to reimburse in the event that a future recovery is obtained. In some cases, at a point of time far in the future, the beneficiary may eventually recover a payment from the tortfeasor and be required to reimburse the plan. However, in far more common situations, the beneficiary decides not to pursue an action against the responsible tortfeasor, or based on the uncertainties and expense of litigation agrees to a settlement which is less than full compensation. In these common scenarios, the beneficiary retains the benefit of having had his medical expenses paid on his or her behalf. This benefit will be lost if benefit plans stop advancing benefits because they cannot enforce an equitable claim of reimbursement.

III. THE STATE COURTS DO NOT OFFER UNIFORM OR EFFECTIVE REMEDIES TO BENEFIT PLANS.

Petitioners' suggestion that benefit plans really do not need an equitable remedy pursuant to § 502(a)(3) of ERISA because they have other adequate options, such as intervening in state court lawsuits, should be rejected. As an initial matter, the Petitioners' suggestion that benefit plans should intervene in state court tort actions completely ignores the fact that "the vast majority of tort actions end in settlement." Amicus Br. the American Trial Lawyers Association at 17. Therefore, there will usually not be a state court lawsuit in which to intervene in the first place.

The Petitioners' suggestion that benefit plans have adequate remedies in the various state court jurisdictions also runs contrary to Congress's explicit purpose to obtain uniformity for benefit plans when it enacted ERISA. The purpose of the Act was to provide plans a uniform set of administrative procedures, rather than make them comply with a different set of procedures for processing claims and disbursing benefits in each state and subdivision. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) (*quoting Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990).) When applying this Congressional purpose to subrogation and reimbursement provisions in particular, the Court held that the "application of differing state subrogation laws to plans would therefore frustrate plan administrators' continuing obligation to calculate uniform benefit levels nationwide." *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990). *See also* 29 U.S.C. § 1144 (establishing the preemption of state laws which related to ERISA benefit plans.)

Intervention in state court tort lawsuits does not present a uniform set of procedures to address benefit plans' equitable rights of reimbursement and subrogation. If a beneficiary's tort action is pending, and assuming that the benefit plan is even aware of the lawsuit, benefit plans will be required to become expert in the intricacies of each state's tort recovery laws. They also will be required to monitor each jurisdiction's peculiar court rules, and they will be required to hire local attorneys to protect the benefit plans' interests. In addition, these state court actions will be located in any jurisdiction in which a benefit plan's beneficiary might travel or reside. As such, the need to defend the benefit plan's interests in far-flung jurisdictions will increase the plan's administrative expenses. The result of losing a uniform equitable remedy in the federal courts will be increased administrative costs to the benefit plans, and a concomitant

reduction in assets available to pay benefits for the plans' participants and beneficiaries.

Benefit plans frequently encounter situations, without the ability to intervene in the beneficiary's state tort lawsuit, in which they must take action to enforce equitable subrogation rights. In these situations a uniform equitable remedy is required to enforce the terms of the plan. Tort victims who have received payments from the responsible tortfeasors, and their attorneys, often do not act in good faith with regard to their obligations.[3]

An illustrative situation was presented to the district court in *HCA v. Clemmons*, 162 F. Supp. 2d 1374 (M.D. Ga. 2001). The beneficiary obtained medical benefits to pay for expenses related to her injury in an automobile accident. The beneficiary accepted the benefits from the plan with the understanding that the plan would later assert an equitable right of reimbursement in the event that she received a recovery from the responsible tortfeasor. *Id.* at 1376. The

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[3] Arguments based on the harshness of results in some subrogation cases ignores the obvious fact that recoveries from responsible tortfeasors, whether through a judgment or settlement, are universally intended to compensate the injured individual for the costs of treating injuries caused by the wrongdoing of the tortfeasor. *Mid At Med Servs, Inc v Do*, 294 F. Supp. 2d 695, 701 (D. Md. 2003) (holding that if a tort victim obtains a recovery that does not otherwise specify the nature of compensation, "it may be presumed that said recovery is intended to cover medical expenses"). In *Bunting Bearings Corp. v Miller*, 139 F. Supp. 2d 858 (N. D. Ohio 2001), the district court took judicial notice of the fact that "personal injury lawyers in personal injury cases typically assess the settlement value of a case on a multiple of the 'specials'." *Id.* at 859. The term "specials" usually means the medical expenses and lost wages incurred as a result of an injury. *Id.* These observations demonstrate why benefit plans' right to a portion of settlement proceeds obtained from responsible tortfeasors is appropriate because the settlement proceeds were intended to compensate the beneficiary for the cost of medical care in the first place.

benefit plan also placed the responsible tortfeasor's insurance company on notice of its reimbursement claim, and the insurance company agreed to add the benefit plan's name on any subsequent settlement checks. *Id.* at 1377.

Notwithstanding the fact that both the beneficiary and the responsible tortfeasor's insurer were aware of the benefit plan's claim, the two made a secret agreement to circumvent the benefit plan's equitable interest in the settlement. Rather than include the benefit plan on the settlement check, the insurance company paid the settlement proceeds directly to the tort victim without adding the plan's name on the check. *Id.* The insurance company agreed to circumvent the benefit plan's equitable claim in exchange for the beneficiary's promise to indemnify the insurance company. *Id.* Thereafter, in the absence of a tort lawsuit in which to intervene, the benefit plan was forced to bring an action against the beneficiary to obtain an equitable remedy. This is an example of how, without the very narrow equitable remedy left to it under § 502(a)(3), a benefit plan would not otherwise be able to enforce its rights in the federal courts. That result is not consistent with Congress's intention in enacting ERISA to create a uniform set of administrative procedures under which benefit plans may operate. *Fort Halifax Packing Co.*, 482 U.S. at 9.

Of course, the existence of a viable state court cause of action cannot be assumed, as there is no guarantee that such an action will be permitted by every state court. In *Great-West Life & Annuity Ins. Co. v. Smith*, 180 F. Supp. 2d 1311 (M.D. Fl. 2002), another common situation is illustrated. The beneficiary accepted benefits from the plan to pay for expenses related to injuries caused in an automobile accident. The beneficiary's attorney negotiated a settlement with the responsible tortfeasor and, with full knowledge of the benefit plan's claim of reimbursement and subrogation, the attorney disbursed the settlement proceeds to the beneficiary (and no

doubt retained a contingency fee from the proceeds). *Id.* at 1313. The beneficiary and attorney refused to recognize the benefit plan's equitable claim to a portion of the settlement proceeds. The benefit plan was therefore required to protect its rights by bringing an action for equitable reimbursement against the beneficiary and attorney.

On a motion to dismiss, the district court ruled that the benefit plan properly sought equitable relief under § 502(a)(3) of ERISA. *Id.* However, the district court dismissed all of the plan's state court causes of action. *Id.* at 1313-14. This case demonstrates a situation where, if the Court accepts the Petitioners' argument that there should be no equitable remedy under § 502(a)(3), the benefit plan would have had no ability to enforce the terms of its plan of benefits and its equitable claim to a portion of the settlement. It was only through the very narrow equitable remedy of constructive trust that any relief was available to the benefit plan. If this narrowest equitable remedy is abolished by the Court overruling the decision of the court below, benefit plans may be left with no recourse to enforce their rights of reimbursement and subrogation. As discussed above, the absence of a remedy in this situation surely will result in benefit plans not advancing benefits for injuries caused by third parties. This outcome will place a burden on beneficiaries that is clearly greater than the "devastation" described by Petitioners when benefit plans seek reimbursement.

Forcing benefit plans to attempt to enforce equitable rights in the state courts also will result in the uneven payment of benefits to beneficiaries. This is because, depending on which jurisdiction is involved, some beneficiaries will be required to reimburse medical benefits out of payments from responsible tortfeasors. The net result for these beneficiaries will be that the plan does not pay benefits when third party liability is involved. Other beneficiaries will not be required to reimburse medical benefits out of settlement payments because state

court actions to enforce reimbursement and subrogation are prohibited in some jurisdictions. *See, e.g., Liberty Northwest Ins. Corp. v. Kemp*, 192 Ore. App. 181, 85 P.3d 871 (Ct. App.), *rev. denied*, 337 Ore. 34, 93 P.3d 71 (2004) (holding benefit plan's state breach of contract action for reimbursement preempted by ERISA), *but see Providence Health Plan v. McDowell*, 385 F.3d 1168, 1173 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 1726 (2005) (disagreeing with conclusion of preemption). The resulting inconsistent benefit payments on a state-by-state basis, of course, is a situation Congress sought to avoid when it enacted ERISA. *FMC Corp.*, 498 U.S. at 60. Affirming the Fourth Circuit's ruling in this case, and preserving the very limited equitable remedy under § 502(a)(3), will avoid these state-by-state inconsistencies in benefit payments.

CONCLUSION

For the foregoing reasons, the NCCMP respectfully urges the Court to affirm the decision below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOEL SEREBOFF AND MARLENE SEREBOFF,

Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE SELF-INSURANCE INSTITUTE OF AMERICA, INC. - IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Self-Insurance Institute of America, Inc. ("SIIA") is a non-profit organization with nearly 1000 members, serving tens of millions of health plan beneficiaries, dedicated to the advancement and protection of the self-insurance industry. SIIA's membership includes self-insured entities such as employer plan sponsors, as well as service providers such as third-party administrators, reinsurance companies, and other entities that support the self-insurance business. SIIA is the only organization in the United States that exclusively represents firms, professionals, and organizations that participate in the broad spectrum of self-insurance, including self-insured group health plans.

Through SIIA, its members coordinate their views and provide practical information and recommendations to government and the public on a range of subjects relevant to the effective functioning of the self-insurance system, including the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, that concern self-insured health plans and plan participants. SIIA's mission includes rendering assistance to courts in their deliberations on significant self-insured health plan issues of broad concern to its members. Indeed, SIIA has filed briefs as *amicus curiae* in previous ERISA cases before the Court. *See, e.g.*, Brief *Amicus Curiae* of Self-Insurance Institute of America, *Great-West Life & Annuity Insurance Co. v. Knudson*, No. 99-1786 (filed May 10, 2001).

SIIA has a strong interest in preserving its members' ability to recover plan funds from participants that accept medical benefits but then refuse to honor the reimbursement

1. The parties have filed letters with the Court consenting to all *amicus* briefs. No counsel for a party has written this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

terms of their agreements after obtaining compensation from third parties through legal action or settlement. SIIA's members depend on reimbursement to ensure the solvency of their plans and to provide benefits to all participants at lower costs. To the extent that SIIA's members are barred from seeking reimbursement according to the terms of a plan, they might be forced to take dramatic action, such as increasing contributions, reducing benefits, or otherwise amending plan terms to protect against this growing and unnecessary risk. Each of these scenarios will result in a reduction in health care insurance for the Nation's workforce based solely on judicially approved inequitable practices.

SUMMARY OF ARGUMENT

Congress enacted ERISA to meet the twin goals of uniform administration of employee benefit plans and plan solvency. For this reason, Congress made ERISA broadly preemptive and provided a series of mechanisms for recovery of plan funds, including "appropriate equitable relief" pursuant to Section 502(a)(3) of ERISA. 29 U.S.C. § 1132(a)(3). This Court consistently has maintained that "appropriate equitable relief" refers to "those categories of relief that were typically available in equity" including, for example, restitution. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993). In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), the Court clarified the circumstances under which restitution is available. Under *Knudson*, Section 502(a)(3) allows restitution where the relief sought comports with traditional equitable principles. Thus, recovery through the imposition of a constructive trust or equitable lien is permissible so long as the funds sought are traceable to an identifiable fund.

This is precisely the case here. Respondent MAMSI honored the terms of the plan and paid the Sereboffs' medical expenses of approximately $75,000. The plan contained a standard subrogation provision that required the Sereboffs

to reimburse the company if the Sereboffs recovered from a third-party tortfeasor. Although the Sereboffs eventually settled their personal injury suit against the third-party tortfeasor for $750,000, they steadfastly refused to reimburse MAMSI. MAMSI thus sought judicial relief, invoking its subrogation-based right to reimbursement.

Subrogation-based restitution is without question a remedy that was "typically available" in equity. And there is no dispute that the funds at issue are traceable to an identifiable fund belonging to the Sereboffs. Accordingly, although two courts of appeals have erroneously concluded that *Knudson* forecloses equitable restitution altogether, this case presents a routine application of that decision. Unfortunately, the straightforward command of *Knudson* has not dissuaded plan participants and their counsel from distorting *Knudson*'s discussion and analysis of Section 502(a)(3) to thwart recovery, even in the many circuits that have properly recognized that, post-*Knudson*, equitable restitution remains a viable remedy. In the discussion that follows, *amicus* SIIA highlights three common examples of these subterfuges.

First, the plaintiffs' bar has argued that recovery is not permitted if the plan participant has converted the funds for his or her own use. Thus, plan participants are encouraged to convert damages awards and settlement payments into property to frustrate reimbursement claims. *Knudson* did not endorse such abusive and manipulative practices, but merely observed that recovery is foreclosed when the funds have been dissipated so that "no product remains." 534 U.S. at 212. Where a product remains, the Court explained that it was retaining the rule of *Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*, that the "trustee or beneficiaries may . . . maintain an action for restitution of the property (if not already disposed of), and disgorgement of proceeds

(if already disposed of), and disgorgement of the third person's profits derived therefrom." 530 U.S. 238, 250 (2000).

Second, the plaintiffs' bar has frequently distorted *Knudson* by arguing that funds are not traceable to an identifiable fund when the money is commingled with the plan participant's general assets. This argument is unsustainable under traditional principles of equity. As the Restatement of Restitution explains, "[t]he person whose money is wrongfully mingled with money of the wrongdoer does not thereby lose his interest in the money, although the identity of his money can no longer be shown, but he acquires an interest in the mingled fund." RESTATEMENT (FIRST) OF RESTITUTION § 209 (1937). Purporting to follow *Knudson*, some courts have mistakenly concluded that commingling is fatal to a claim asserted under Section 502(a)(3). *Knudson* cannot be read, however, to create a commingling loophole that would effectively undo any means of recovery under Section 502(a)(3).

Third, the plaintiffs' bar has argued in the lower courts that funds are not subject to reimbursement if they are transferred to an account in the attorney's possession before the constructive trust or equitable lien can be imposed. This argument is inconsistent with basic principles of equity, directly contradicted by *Knudson*, and contrary to basic agency law. The attorney is the agent of the plan participant and holds the funds subject to the direction of the principal. The funds – rightfully subject to reimbursement – thus remain in the "constructive" possession of the plan participant. ERISA cannot be construed to condone cat and mouse games that plainly are at odds with the overarching purposes of Congress's statutory scheme.

Furthermore, the legal questions at issue in this case cannot be divorced from the broad purposes of ERISA or the practical impact that rules of recovery adopted in this and

similar cases have on self-funded plans. Outright precluding reimbursement – as the Sixth and Ninth Circuits have done – or incentivizing the plaintiffs' bar to evade recovery through cynical and manipulative tactics, will inevitably lead employers to take remedial action that will inure to the detriment of their employees. In particular, employers could be forced to increase employee contributions, reduce benefits, or both. Employers also might take steps to obtain recovery by withholding future benefits or limit the availability of insurance for third-party negligence claims. This is particularly true in the case of self-funded plans that, in exchange for the flexibility that self-funding provides, assume the risk of loss.

The judicial preclusion of equitable restitution and other equitable remedies that plainly are contemplated by Section 502(a)(3) cannot be squared with the core purposes of ERISA. Accordingly, in affirming the decision below, the Court should clarify that *Knudson* neither eliminates the right of employer plans to seek equitable restitution nor condones cynical gamesmanship calculated to defeat plan claims for reimbursement.

ARGUMENT

I. THE FOURTH CIRCUIT CORRECTLY RULED THAT SECTION 502(a)(3) OF ERISA ALLOWS EQUITABLE RESTITUTION OF FUNDS SUBJECT TO REIMBURSEMENT.

Section 502(a)(3) of ERISA allows a "participant, beneficiary or fiduciary" to obtain "appropriate equitable relief" to "enforce any provisions of . . . the terms of the plan." 29 U.S.C. § 1132(a)(3). This Court has explained that "appropriate equitable relief" includes "those categories of relief that were typically available in equity" including, for example, "injunction, mandamus, and restitution[.]" *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993);

see also Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 253 (2000) ("[A]n action for restitution against a transferee of tainted plan assets satisfies the 'appropriate[ness]' criterion in § 502(a)(3). Such relief is also 'equitable' in nature.") (citation omitted). As the Third Circuit has summarized:

> Put simply, equitable relief under § 502(a)(3)(B) is to be construed by reference to the types of relief typically available in equity, and courts are to analyze the underlying nature of the claim and relief requested by a plaintiff in order to determine whether that relief has been typically available in equity.

Skretvedt v. E.I. DuPont De Nemours, 372 F.3d 193, 211 (3d Cir. 2004) (internal quotations omitted).

In *Great-West Life & Annuity Inc. Co. v. Knudson*, 534 U.S. 204, 214 (2002), the Court drew an admittedly "fine distinction between restitution at law and restitution in equity" and in so doing clarified that not all restitution claims were cognizable in equity. Because "[i]n the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity . . . restitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case[.]" *Id.* at 212-13 (citations and internal quotations omitted). The Court added: "whether [the claim] is legal or equitable depends on the basis for [the plaintiff's] claim and the nature of the underlying remedies sought." *Id.* (citations omitted).

According to *Knudson*, the distinction between legal and equitable restitution ordinarily turns on whether the plaintiff is able to identify specific funds or property in the defendant's possession. Historically, where "the plaintiff could *not* assert title or right to possession of particular property . . . the plaintiff had a right to restitution *at law* through an action derived from the common-law writ of assumpsit." *Id.* at 213

(citations and internal quotations omitted). Conversely, "a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* (emphasis in original) (citations omitted). Hence, the Court found that, within the limitations that traditional equity jurisprudence places on restitutionary awards, Section 502(a)(3) plainly authorizes recovery of wrongfully retained benefits from plan participants. *See Knudson*, 534 U.S. at 213 ("[A] plaintiff could seek restitution in equity . . . where *money* or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession.") (emphasis added); *see also Skretvedt*, 372 F.3d at 211 ("[A] plaintiff [can] seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff [can] clearly be traced to particular funds or property in the defendant's possession."). This brand of equitable relief typically is accomplished through the imposition of a constructive trust or an equitable lien. *See Knudson*, 534 U.S. at 213 ("A court of equity could . . . order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner.").

This case falls squarely within the class of equitable restitution claims endorsed in *Knudson*. MAMSI honored the terms of the plan and paid the Sereboffs' medical expenses, which totaled $74,869.37. *See Mid Atl. Med. Servs., Inc. v. Sereboff*, 303 F. Supp. 2d 691 (D. Md. 2004), Joint Stipulation of Facts (Attachment to Court Opinion) ¶ 10, *aff'd*, 407 F.3d 212, 218 (4th Cir. 2005), *cert. granted*, 126 S. Ct. 735 (2005). The plan required the Sereboffs to "reimburse the Company net of reasonable attorney fees and

court costs prorated to reflect that portion of the total recovery which is due the Company for benefits paid." *Id.* ¶ 11. MAMSI repeatedly made both the Sereboffs and their personal injury counsel aware of the duty owed under the plan's reimbursement provision. *See id.* ¶¶ 13-21; 23-26; 30-33. The Sereboffs eventually settled their personal injury suit against the third-party tortfeasor for $750,000, *see id.* ¶ 34, but refused to reimburse MAMSI. *See id.* ¶ 37. MAMSI thereafter sought judicial enforcement of its equitable right to subrogation-based reimbursement. *See* Brief of Petitioners at 21 ("Pet. Br.") ("The district court's assertion that the funds in question belong in good conscience to the Plan' (because the plain language of the plan indisputably requires reimbursement under the circumstances of the Sereboffs' tort claims arising out of the California accident) is perhaps true as a matter of fairness.") (internal quotation omitted).

Subrogation is a typical equitable remedy. As one court explained, "[s]ubrogation is an equitable doctrine the essential purpose of which is to provide for a proper allocation of payment responsibility. It seeks to impose ultimate responsibility for a wrong or loss on the party who, in equity and good conscience, ought to bear it." *Mahler v. Szucs*, 957 P.2d 632, 640 (Wash. 1998) (citing Ronald C. Horn, SUBROGATION INSURANCE THEORY AND PRACTICE 3 (1964)); *see also Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 137 n.12 (1962) (explaining that subrogation is "a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties") (quoting *Memphis & L.R.R. Co. v. Dow*, 120 U.S. 287, 301-302 (1887)); 1 George E. Palmer, THE LAW OF RESTITUTION 1.5(b) (1978) ("Subrogation is an equitable remedy that was used as early as the seventeenth century."); D. Dobbs, LAW OF REMEDIES 4.3(1) (2d ed. 1993) (explaining that subrogation is a "major restitutionary remedy in equity"). A crucial aspect of equitable subrogation "is the right to reimbursement."

Mahler, 957 P.2d at 640; *see also* RESTATEMENT (FIRST) OF RESTITUTION § 162 ("Where property of one person is used in discharging an obligation owed by another . . . under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee."); Alan O. Sykes, *Subrogation and Insolvency*, 30 J. Legal Stud. 383, 383 (June 2001) ("If the insured has already received money from the injurer, the insured may hold such funds in a 'constructive trust' for the insurer because of the insurer's subrogation rights.").

The vast majority of courts that have considered claims similar to the one presented here have concluded that a constructive trust or equitable lien for the recovery of plan funds "nestles comfortably with ERISA's concept of equity." *Admin. Comm. of Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan v. Varco*, 338 F.3d 680, 687 (7th Cir. 2003) (citations and quotations omitted), *cert. denied*, 542 U.S. 945 (2004); *see also Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan v. Willard*, 393 F.3d 1119, 1125 (10th Cir. 2004) ("[w]e find that the instant case, rather than involving one for monetary damages, involves exactly the type of equitable restitution claim the Court had in mind in *Great-West*"); *Bombardier Aerospace Employee Welfare Benefit Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348, 355 (5th Cir. 2003) ("[B]ecause it seeks to recover specifically identifiable funds that are in the constructive possession and the legal control of the participant but belong in good conscience to the Plan, its action for a constructive trust in no way seeks to impose personal liability on either defendant."), *cert. denied*, 541 U.S. 1072 (2004). MAMSI's subrogation-based restitution claim seeking the return of monies paid on the Sereboffs' behalf therefore falls well within the ambit of Section 502(a)(3).

The position advocated by Petitioners and their supporting *amicus* the American Trial Lawyers Association ("ATLA"), which is premised on Sixth and Ninth Circuit rulings rejecting subrogation-based restitution as a legitimate form of equitable relief, completely mischaracterizes *Knudson*. *See* Pet. Br. 12-23; Brief *Amicus Curiae* of ATLA 4-15 ("ATLA Br."). In Petitioners' view, equitable relief is uniformly unavailable to plan providers both because of the existence of a contract and because the relief sought takes monetary form. *See Westaff (USA) Inc. v. Arce*, 298 F.3d 1164, 1166 (9th Cir. 2002) (denying recovery under Section 502(a)(3) because the plan sought "to enforce a contractual obligation for the payment of money, a classic action at law and not an equitable claim"); *Qualchoice, Inc. v. Rowland*, 367 F.3d 638, 649 (6th Cir. 2004) ("We conclude . . . that the source of the claim asserted by Qualchoice is a contract to pay money and that the procedural mechanisms of constructive trust and equitable lien are not proper mechanisms for enforcing this right[.]"), *cert. denied*, 125 S. Ct. 1639 (2005). Under Petitioners' approach, *Knudson* supports the wholesale elimination of equitable restitution in the ERISA context based solely on the existence of the plan participant's parallel contractual obligation to reimburse the plan.

Contrary to Petitioners' contentions, *Knudson* expressly contemplates concrete situations where plan fiduciaries can obtain equitable monetary reimbursement. *See Knudson*, 534 U.S. at 213 ("[A] plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where *money* or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular *funds* or property in the defendant's possession.") (emphasis added). Thus, as one court correctly has observed, "the approach of the Sixth and Ninth Circuits simply proclaims that because the plan fiduciary's rights ultimately derive from a contract and the plan seeks money, the plan must be seeking legal relief, a conclusion that is neither necessarily consistent

with historical practice nor sufficiently nuanced under the *Great-West* formulation." *Scholastic Corp. v. Najah Kassem & Casper & De Toledo LLC*, 389 F. Supp. 2d 402, 411 (D. Conn. 2005); *see also Willard*, 393 F.3d at 1125 ("After all, any equitable relief, including those forms explicated by the Court as available under § 502(a)(3), must involve the direct or indirect transfer of money, and we cannot read the statute to proscribe all forms of relief."); *Wellmark, Inc. v. Deguara*, 257 F. Supp. 2d 1209, 1215 -1216 (S.D. Iowa 2003) ("The Ninth Circuit follows the ultimate reasoning of *Great-West* without noting the essential factual distinction Justice Scalia specifically discussed when the "money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession.") (internal citations omitted).

Furthermore, the means that MAMSI employed to vindicate its equitable interest comport fully with traditional equity jurisprudence. MAMSI sought to impose a constructive trust or, in the alternative, an equitable lien. There can be no dispute that both of these remedies are proper equitable vehicles for recovering funds from the Sereboffs. *See Knudson*, 534 U.S. at 213. There also can be no legitimate dispute that the settlement funds belong "in good conscience" to MAMSI. *See Willard*, 393 F.3d at 1122 (explaining that because the plan "contained [an] express, unambiguous reimbursement provision[] . . . the disputed funds belonged in good conscience to the plan") (internal citations omitted). Last, the settlement funds are identifiable and traceable to money in the Sereboffs' possession. Thus, as the Fourth Circuit properly concluded, MAMSI is entitled to equitable restitution through the imposition of a constructive trust or equitable lien because it seeks "to recover funds that are specifically identifiable, belong in good conscience to

MAMSI, and are within the possession and control of the Sereboffs." *Mid Atl. Med. Servs., LLC v. Sereboff*, 407 F.3d 212, 218 (4th Cir. 2005), *cert. granted*, 126 S. Ct. 735 (2005).[2]

Knudson makes clear that plan recovery in the circumstances presented here is precluded only in a narrow band of cases where the funds have been dissipated so that no product remains. Only in such a case are the funds untraceable to an identifiable fund. By contrast, there is no dispute in this case that the Sereboffs had an equitable duty to reimburse MAMSI and failed to do so. Moreover, the funds at issue – the settlement proceeds – remain in the possession and control of the Sereboffs. The Fourth Circuit thus correctly ruled that MAMSI is entitled to a constructive trust or equitable lien pursuant to Section 502(a)(3).[3]

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2 . The Court should make clear that Section 502(a)(3) permits recovery regardless of whether the plan has paid money directly to the participant or paid the fees of a third-party medical provider. In either case, despite Petitioners' argument to the contrary, *see* Pet. Br. 20-21, the identifiable "res" is the damages award or settlement proceeds – not the money transferred from the plan to the participant. Petitioners' argument that only the money "literally" paid to the participant could be subject to equitable recovery, *see* Pet. Br. 20, elevates abstraction over substance and would effectively preclude equitable subrogation in all cases, a proposition rejected by this Court in *Mertens*, *Harris Trust*, and *Knudson*.

3. Requiring the Sereboffs to reimburse the plan not only comports with principles of equity but with basic economic logic as well:

> [F]rom the standpoint of optimal risk allocation, the fortuitous presence of an injurer who is liable for the insured's losses does not affect the risk that the insured should optimally bear. Thus, if it is optimal for the insured to bear the risk of uncovered losses associated

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II. SECTION 502(a)(3) DOES NOT ALLOW PLAN PARTICIPANTS TO FRUSTRATE RECOVERY BY CONVERTING, MINGLING, OR SHIFTING FUNDS SUBJECT TO EQUITABLE RESTITUTION.

As the Fourth Circuit properly held, *Knudson* does not eviscerate the rights of plan providers to seek reimbursement from plan participants. Embracing a crabbed reading of *Knudson*, however, plan participants and trial lawyers have devised creative stratagems to avoid their equitable restitution obligations. Specifically, plan participants and their counsel have parsed *Knudson* to draw a roadmap for avoiding reimbursement obligations that relies upon a tortured and narrow view of the "identifiable fund" and "traceability" requirements. In their view, equitable restitution is available only if the settlement proceeds remain in the plan participant's actual possession and in a pristine and segregated fund. For the reasons set forth below, neither traditional equity jurisprudence nor this Court's decisions interpreting Section 502(a)(3) condone these attempts to avoid lawful claims of equitable restitution through cynical machinations calculated to frustrate a plan provider's right of recovery.

The inexorable thrust of the arguments advanced by the Sereboffs and ATLA is that *Knudson* allows plan participants and plaintiffs' lawyers to avoid equitable restitution obligations by converting the funds before a constructive trust or equitable lien is established. *See* Pet. Br. 20-21; ATLA Br. 9-10. This position is specious. In *Knudson*, this Court confronted an anomalous set of circumstances in which the plan participant *never obtained or controlled* the settlement

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> with accidents in which no injurer is liable, the insured should bear the same risk in accidents in which an injurer is liable.

Alan O. Sykes, *Subrogation and Insolvency*, 386.

proceeds secured in the personal injury suit. California law required that the settlement proceeds be placed directly in a "Special Needs Trust" to provide for Janette Knudson's medical care. *See Knudson*, 534 U.S. at 207. Relying on this unusual circumstance, the Court explained that recovery was unavailable because the funds had been "dissipated so that no product remain[ed]" and, for this reason, Great-West could only present a legal restitution claim akin to that of a general creditor. *Id.* at 213.

"Dissipation" of fund assets so that "no product remains" – as traditional equity law understands these terms – is an exceptionally rare occurrence. For example, as the comment to Section 215 of the Restatement explains, dissipation occurs "if the wrongdoer has used the money of the claimant in speculation and has lost it all" or "if a trustee sells trust property and dissipates the proceeds." RESTATEMENT (FIRST) OF RESTITUTION § 215 cmt. a. In these narrow circumstances, "the claimant cannot enforce a constructive trust of or an equitable lien upon other property of the wrongdoer, and has only a personal claim against the wrongdoer, and is not entitled to priority over other creditors of the wrongdoer." *Id.* As a necessary corollary to this principle, however, there *is* a general right of equitable recovery whenever a "product" remains. Thus, in at least three common circumstances, *Knudson* does not preclude recovery because a "product" remains that can be traced to an identifiable fund.

First, a plan participant cannot avoid equitable restitution by converting the damages award or settlement proceeds to his or her own use. As the Restatement explains, "[w]here a person . . . disposes of property of another . . . and acquires in exchange other property, the other is entitled *at his option* to enforce either (a) a constructive trust of the property so acquired, or (b) an equitable lien upon it to secure his claim for reimbursement from the wrongdoer." RESTATEMENT (FIRST)

OF RESTITUTION § 202.[4] Importantly, this equitable rule applies even where "there is no fiduciary relationship between the wrongdoer and the claimant." *Id.* cmt. b. Accordingly, the participant cannot preclude equitable recovery by using monies that otherwise would be subject to equitable restitution to purchase property.

The Supreme Court consistently has endorsed this view of equity law. In *Harris Trust*, 530 U.S. at 250, this Court made clear that the "trustee or beneficiaries may . . . maintain an action for restitution of the property (if not already disposed of), and *disgorgement of proceeds (if already disposed of)*, and disgorgement of the third person's profits derived therefrom." (emphasis added). And the Court was careful to explain that its decision in *Knudson* in no way undercut the rule of *Harris Trust*. *See Knudson*, 534 U.S. at 215 ("While we did not expressly distinguish between legal and equitable restitution, the nature of the relief we described in *Harris Trust* – a claim to specific property (*or its proceeds*) held by the defendant – *accords with the restitution we describe as equitable today*.") (emphasis added). *Harris Trust* and *Knudson* therefore unequivocally confirm that the conversion of funds subject to equitable restitution does not insulate a plan participant from liability.[5]

4. This rule also requires the wrongdoer to surrender any proceeds from the transfer. *See id.* § 202 cmt c ("The rule which compels the wrongdoer to bear any losses and to surrender any profits operates as a deterrent upon the wrongful disposition of the property of others."). "Accordingly, the person whose property is wrongfully used in acquiring other property can by a proceeding in equity reach the other property and compel the wrongdoer to convey it to him. The wrongdoer holds the property so acquired upon a constructive trust for the claimant." *Id.*

5. ATLA argues that a plan should not be permitted to exercise its right to reimbursement unless the plan participant has been "made whole" by the damages award or settlement, even where the plan

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Second, despite some confusion in the lower courts, plan participants cannot avoid equitable restitution by mingling the damages award or settlement proceeds with their personal assets. "Where a person wrongfully mingles money of another with money of his own, the other is entitled to obtain reimbursement out of the fund." RESTATEMENT (FIRST) OF RESTITUTION § 209. As the comment further explains, "[t]he person whose money is wrongfully mingled with money of the wrongdoer does not thereby lose his interest in the money, although the identity of his money can no longer be shown, but he acquires an interest in the mingled fund." *Id.* cmt. a.[6] This rule extends to property acquired through

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expressly provides otherwise. *See* ATLA Br. 27-29. The Court should reject ATLA's argument for its preferred version of the "made whole" rule. Federal common law stands in direct opposition to such a rule. *See, e.g., Copeland Oaks v. Haupt*, 209 F.3d 811, 813 (6th Cir. 2000) (explaining that a plan can override the "made whole" rule by being "specific and clear in establishing *both* a priority to the funds recovered *and* a right to any full or partial recovery"). To the extent that ATLA is asking this Court to permit state rules of decision to govern, ATLA's argument would produce an untenable regime, because the states do not apply the "made whole" rule in a uniform manner. For example, Ohio has adopted the federal rule, *see N. Buckeye Educ. Council Group Health Benefits Plan v. Lawson*, 798 N.E.2d 667, 673 (Ohio Ct. App.), *aff'd* 814 N.E.2d 1210 (Ohio 2004), Indiana has adopted a percentage-based approach, *see* Ind. Code § 19 34-51-2-19, and several states apply the rule absolutely, *see, e.g., York v. Sevier County Ambulance Authority*, 8 S.W.3d 616, 617 (Tenn. 1999). To adopt ATLA's position thus would undermine a basic precept of ERISA that plans should not be subject to fifty different state laws. *See, e.g., Larocca v. Borden, Inc.*, 276 F.3d 22, 30 (1st Cir. 2002) ("ERISA preempts state legislation designed to limit plans' subrogation and coordination of benefits provisions.") (citing *FMC Corp. v. Holliday*, 498 U.S. 52 (1990)).

6. And, "if the wrongdoer is insolvent, the other person is entitled to restitution out of the mingled fund and is entitled to priority over other creditors of the wrongdoer." RESTATEMENT OF RESTITUTION § 209.

the use of the mingled funds. *See id.* § 210 ("Where a person wrongfully mingles money of another with money of his own and with the mingled fund acquires property, the other is entitled to an equitable lien upon the property to secure his claim for reimbursement."); *see also Skretvedt*, 372 F.3d at 214 (explaining that because "we need look no further than the ERISA plans that withheld Skretvedt's benefits[,] . . . [a]s did the fiduciaries in *Harris Trust*, Skretvedt has sufficiently identified specific funds traceable to the defendant ERISA plans that belong in good conscience to him"); *In re Anjopa Paper & Bd. Mfg. Co.*, 269 F. Supp. 241, 261 (S.D.N.Y. 1967) ("It is a principle well established that the mere fact that a claimant's money is mingled with money of the wrongdoer does not preclude the claimant from tracing his money into the mingled fund and enforcing an equitable lien upon it.").[7]

Some courts have adhered to the Restatement's articulation of this rule when construing Section 502(a)(3). *See, e.g., Bohannan v. Wal-Mart Benefits Dept. Enrollment Team*, No. 504CV150FJSGJD, 2005 WL 1460336, at *5 (N.D.N.Y. June 20, 2005) (unpublished decision) ("It is not necessary that the precise items of currency be identifiable, which, in electronic transactions, would never be possible.") *Lumenite Control Tech., Inc. v. Jarvis*, 252 F. Supp. 2d 700, 704 (N.D. Ill. 2003) ("Where a single account contains money to which the account holder is entitled as well as money that rightfully belongs to another person, the rightful owner is entitled to a lien on the commingled fund . . . . in the amount of his own monies traceable to it. . . . D. Dobbs, LAW OF REMEDIES 6.1(4) (2d ed. 1993).").

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7. Equity deals even more harshly with those who intentionally use the mingled funds to purchase property in order to thwart the claim of restitution. *See id.* § 210 ("If the wrongdoer knew that he was acting wrongfully, the other is entitled at his option to a share of the property in such proportion as his money bore to the whole amount of the fund.").

Other courts have effectively ignored the approach endorsed in the Restatement and deemed commingling a bar to recovery. *See, e.g.*, *BlueCross BlueShield v. Carillo*, 372 F. Supp. 2d 628, 638 (N.D. Ga. 2005) ("Plaintiff does not seek recovery of specified, identifiable funds, but instead seeks recovery of funds that have been comingled into various checking accounts and spent, in part, to purchase a truck. Under those circumstances, relief under § 1132(a)(3) is unavailable."); *Popowski v. Parrott*, 403 F. Supp. 2d 1215, 1220 (N.D. Ga. 2004) ("The only information before the court is that Defendant received slightly more than $200,000 in net settlement proceeds in October 2003. Those funds were placed in her joint checking and/or savings account with her husband. . . . Thus, . . . the funds have never been segregated into an identifiable amount or location."); *Aetna Life Ins. Co. v. DFW Sleep Diagnostics Center*, No. Civ.A.02-1335, 2004 WL 1922033, at *5 (E.D. La. Aug. 25, 2004) (unpublished decision) ("Specifically identifiable funds are those that can clearly be traced to particular funds or property . . . [because] . . . the allegedly excess funds Plaintiff paid to Defendants have either been dissipated or commingled with other funds received from various other payors or sources.").

Despite the chicanery erroneously promoted by decisions like *Carillo*, *Popowski*, and *DFW Sleep Diagnostics Center*, there can be no doubt that funds remain "identifiable" and "traceable" even if they are mingled with the participant's general assets. To hold otherwise would render Section 502(a)(3) an empty promise by grafting a temporal element onto Section 502(a)(3) that finds no support in ERISA. *See, e.g.*, *Primax Recoveries Inc. v. Carey*, 247 F. Supp. 2d 337, 342 n.5 (S.D.N.Y. 2002) (denying restitution "when the 'settlement proceeds' are in nobody's possession, because they are the entirely hypothetical fruit of a potential future settlement that does not yet exist and may never come into

being at all").[8] A plan fiduciary's right of recovery should not depend on its ability to spring into action at precisely the same moment that the plan participant secures a damages award or settlement from the tortfeasor.[9] Putting aside that the adoption of such a rule would reward plan participants for dissembling to avoid their reimbursement obligations, Section 502(a)(3) cannot be read to compel such an absurd result.

Third, plan participants cannot avoid equitable restitution by placing the damages award or settlement proceeds in the possession of their attorneys. Trial lawyers have taken the remarkable position that equitable restitution is unavailable whenever the funds have been placed under their control. *See, e.g.*, *Mank v. Green*, 368 F. Supp. 2d 102, 109 (D. Me. 2005) (plan participant argued that "29 U.S.C. § 1132(a)(3)

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8. *But see Primax Recoveries Inc. v. Duffy*, 204 F. Supp. 2d 1111, 1113 (N.D. Ill. 2002) ("As I read the Supreme Court's opinion [in *Knudson*], it does bar plaintiff's action insofar as it seeks to require defendants to repay money already received in the settlement.")

9. As one court has explained:

> [A]t best, there will be a narrow window in which a fiduciary will be able to seek authorized relief. A fiduciary will not be able to seek relief before a beneficiary has gotten relief in his case against the tortfeasor. On the other hand, if a fiduciary waits too long after a beneficiary has gotten relief in his suit against the tortfeasor, the money could be dispersed such that it would no longer be traceable, and therefore would not be "money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession."

Admin. Comm. v. Merritt, No. 5:01CV00026, 2003 WL 23213577, at *4 (M.D. Ga. 2003) (unpublished decision) (quoting *Knudson*, 534 U.S. at 213).

permits suits against participants' attorneys only if the attorney has a professional or contractual relationship with the plan and asserting that no such relationship exists in this case"). Neither Section 502(a)(3) – nor any decision of this Court – requires the funds to be in the "actual" possession of the plan participant to permit recovery. Because *Harris Trust* makes clear that a fiduciary relationship is not a prerequisite to recovery under Section 502(a)(3), the plan fiduciary can recover from any party that obtains traceable funds subject to a constructive trust or equitable lien. *See Harris Trust*, 530 U.S. at 239 ("Indeed, § 502(a)(3) makes no mention at all of which parties may be proper defendants – the focus, instead, is on redressing the *act or practice* which violates any provision of ERISA Title I.") (citations and quotations omitted); *see also Bombardier*, 354 F.3d at 353-54 ("As *Harris Trust* makes clear, an entity need not be acting under a duty imposed by one of ERISA's substantive provisions to be subject to liability under § 502(a)(3).").

If the plan can recover from third parties under *Harris Trust*, the plan certainly can place a constructive trust or equitable lien on funds in the possession of the participant's authorized agent. *Id.* at 356 (explaining that "funds that the Plan is seeking to recover belong to the participant and are simply being held in a bank account in the name of the participant's attorneys, who are indisputably his agent. Unlike the beneficiaries in *Knudson* . . . the Plan's participant . . . has ultimate control over, and thus *constructive* possession"). (emphasis in original); *see also IBEW-NECA Sw. Health and Benefit Fund v. Douthitt*, 211 F. Supp. 2d 812, 816 (N.D. Tex. 2002) ("In *Great-West Life*, the settlement proceeds were placed in a Special Needs Trust account . . . [and thus] . . . the disputed funds were outside of the defendant's possession and control. In this case, however, the settlement proceeds are being held by Defendant's attorney, as he must do under Texas law."), *aff'd* 98 Fed. Appx. 306 (5th Cir. 2004);

Great-West Life & Annuity Ins. Co. v. Smith, 180 F. Supp. 2d 1311, 1313 (M.D. Fla. 2002) ("While the law firm is correct that it cannot be considered an ERISA fiduciary, a cause of action pursuant to § 1132(a)(3) can be stated against a non-fiduciary.") (internal citation omitted). As at least one court has pointedly observed, "[t]he emphasis on the sanctity of plan provisions does not allow lawyers to be the enablers for participants to avoid following an ERISA plan's provisions without being called to account for such actions under ERISA's remedial scheme." *Greenwood Mills, Inc. v. Burris*, 130 F. Supp. 2d 949, 960 (M.D. Tenn. 2001).[10]

Notwithstanding the unambiguous equitable grounds for allowing recovery where the damages award or settlement proceeds are shifted to the attorney's account, some courts have permitted the manipulation of Section 502(a)(3) in these circumstances to preclude restitution. *See, e.g., Hotel*

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10. In this regard, contrary to ATLA's arguments, *see* ATLA Br. 29-30, unless the plan terms provide otherwise, a contingency fee claim cannot take priority over the plan participant's preexisting reimbursement obligation. As with the "made whole" rule, *supra* note 5, this regime would subject plans to patchwork state legislative regimes contrary to ERISA's stated goal of uniformity. Also, as the Fifth Circuit explained in *Bombardier*, 354 F.3d at 357:

> This assertion ignores the [participant's] pre-existing contractual reimbursement obligation to the Plan, which requires him to reimburse the Plan the full amount of the benefits that he had received from the Plan and to do so out of any third-party recovery, *without deduction for attorney's fees and costs*. This pre-existing reimbursement obligation to the Plan precluded [the participant] from contracting away to the law firm that which he did not own himself, namely, the right to all or any portion of the [settlement] that rightfully belonged to the Plan. In essence, [the participant] could not create a greater right in the funds by virtue of entering the contingent fee arrangement with the law firm than [he] had himself.

Employees & Rest. Employees Int'l Union Welfare Fund v. Gentner, 50 F.3d 719 (9th Cir.1995); *Chapman v. Klemick,* 3 F.3d 1508, 1510-11 (11th Cir. 1993); *Mid Atl. Med. Servs., Inc. v. Do,* 294 F. Supp. 2d 695 (D. Md. 2003); *Great-West Life & Annuity Ins. Co. v. Bullock,* 202 F. Supp. 2d 461, 465 (E.D.N.C. 2002); *Maryland Elec. Indus. Health Fund v. Levitt,* 155 F. Supp. 2d 482, 484 (D. Md. 2001). These decisions plainly misread *Harris Trust* and *Knudson,* which do not permit the plan participant to shift the damages award or settlement funds to their lawyer's bank account in order to preclude recovery under Section 502(a)(3).

In sum, post-*Knudson,* plan participants and their counsel have cynically resorted to creative schemes calculated to thwart the imposition of a constructive trust or equitable lien. These stratagems include converting the damages awards and settlement proceeds into property, mingling tort recoveries with general assets, and shifting the recoveries into counsel's possession. This Court's decisions construing Section 502(a)(3) cannot and should not be read to condone subterfuges that shield plan participants from lawful equitable restitution claims.

III. A MISINTERPRETATION OF SECTION 502(a)(3) WOULD UNIQUELY INJURE SELF-FUNDED PLANS AND ULTIMATELY INURE TO THE DETRIMENT OF PLAN PARTICIPANTS.

It is important to recognize the distinct impact that reversal of the decision below would have on self-funded plans. ERISA grants employers the flexibility to shift the risk associated with employee health benefits to insurance firms or self-fund that risk. By self-funding the risk, employers choose to finance certain risks from their own current revenues, including the medical expenses of their

employees.[11] In contrast to conventional insurance, where the risk of loss is transferred to an insurance carrier upon payment of a premium, self-insurance generally connotes self-assumption (or retention) of one's own risk of a particular loss. As an integral part of a company's risk management program, self-insurance can include the assumption of all or part of a company's risk of loss for health benefits, property and casualty exposures and workers' compensation liabilities. Thus, employers seeking a cost-effective alternative to conventional insurance increasingly have adopted self-insurance programs to manage various elements of risk related to the conduct of their business enterprise.

Companies choose to self-fund employee health benefit plans because, *inter alia*, such plans offer a viable and cost-efficient method of voluntarily providing benefit coverage in the face of rapidly escalating health care costs, and they afford employers greater freedom to offer benefits tailored to their particular needs. *See, e.g., Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003) ("[N]othing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan.") (quoting *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996)), *cert. denied*, 543 U.S. 815 (2004). Consistent with ERISA, "employers have large leeway to design disability and other welfare plans as they see fit." *Id.*; *see also Harris v. Harvard Pilgrim Health Care, Inc.*, 208 F.3d 274, 277 (1st Cir. 2000) ("Since one of the primary functions of ERISA is to ensure the integrity of written, bargained-for benefit plans, generally speaking ERISA does not mandate that a covered plan include

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11. When such benefits are not insured, directly or indirectly, no insurance company is responsible for providing them. Indeed, even before ERISA was enacted, courts understood that an employer that self-funds health benefits is not in the "insurance business." *Farmer v. Monsanto Co.*, 517 S.W.2d 129 (Mo. 1974).

particular substantive provisions.") (internal citations and quotations omitted).

In particular, the ability of employers to exercise direct control over claim settlements, to take advantage of greater flexibility in the design and administration of health plans to meet specific employee needs, to manage cash flows, and to avoid state insurance regulation has stimulated the use of self-insurance mechanisms to fund employee health benefits programs and contributed significantly to their growth.[12] Right to reimbursement clauses are a feature commonly found in employer-sponsored self-funded plans and an integral part of the self-insurance regime. *See Kress v. Food Employers Labor Relations Ass'n*, 391 F.3d 563, 569 (4th Cir. 2004) ("Subrogation clauses requiring reimbursement are, in fact, quite common.") (citation omitted).

While the growth in self-funded plans has been spurred by current market conditions, that growth would not have been possible without the ERISA provisions that buttress the statute's twin goals of promoting solvency and flexibility in employer-provided health benefit plans. ERISA's commitment to solvency is clear. *See, e.g.*, 29 U.S.C. § 1001(b) (explaining that ERISA was enacted to "protect . . . the interests of participants in employee benefit plans and their beneficiaries" and therefore "provid[es] for appropriate remedies, sanctions, and ready access to the Federal courts"); *McGann v. H & H Music Co.*, 742 F. Supp. 392, 393 (S.D. Tex. 1990) (ERISA was enacted to "protect the solvency of employee benefit plans to ensure that the valid claims of employees and their beneficiaries will be paid.") (citation omitted).

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12. For example, companies that pay for health benefits from assets gain the financial advantage of the time-value of their capital. Because medical claims are paid as submitted, company assets can be retained as working capital and invested. Thus, interest can be earned on funds that are retained by the employer and that otherwise would be paid in the form of premiums for conventional insurance.

ERISA's commitment to flexibility is equally well settled. *See, e.g., Metro. Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 732 (1985) (ERISA "does not regulate the substantive content of welfare-benefit plans."); *Hickey v. A.E. Staley Mfg.*, 995 F.2d 1385, 1393 (7th Cir. 1993) (Congress "never intended ERISA to dictate the *content* of welfare benefit plans, much less for the federal courts to determine the *content* of such plans.") (emphasis in original); *Land v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Health & Welfare Fund* 25 F.3d 509, 514 (7th Cir. 1994) ("ERISA's purpose is not to govern the content of welfare-benefit plans but to require the disclosure and reporting of financial and other information, to establish standards of conduct, and to provide appropriate remedies and ready access to the federal courts.") (citing 29 U.S.C. § 1001(a)(b)).

Because ERISA is committed to guaranteeing solvency without regulating the substantive content of plans, "[a] primary purpose of ERISA is to ensure the integrity and primacy of the written plans." *Health Cost Controls v. Isbell,* 139 F.3d 1070, 1072 (6th Cir. 1997) (citing *Duggan v. Hobbs,* 99 F.3d 307, 309-10 (9th Cir.1996; *Van Orman v. Am. Ins. Co.*, 680 F.2d 301, 312 (3d Cir.1982)). The right to equitable reimbursement under Section 502(a)(3) is central to this fundamental purpose. By allowing plans to recover paid medical expenses that are the financial responsibility of third parties, eliminating duplicative payments and preserving limited benefit dollars for the benefit of all participants, right to reimbursement provisions enable employers to offer enhanced benefits to covered participants.[13] By contrast, the effective nullification of reimbursement, which is precisely what the Sereboffs and ATLA would have this Court do,

13. Right to reimbursement clauses generally are triggered in response to legal action or settlements in civil cases for automobile accidents, product defects, accidents on private or public property or for malpractice by hospitals or doctors.

would damage self-funded benefit providers and generally undermine ERISA's goal of making health benefits affordable for the Nation's workforce.[14]

If the Court were to reverse the decision of the Fourth Circuit, the inevitable result would be a reduction in the funds available for payment of benefits that, in turn, would produce predictable responses by employers. *First*, it could force many employers to reduce or eliminate certain benefits, increase premiums, or do both, because a plan's ability to obtain reimbursement from participants is a significant factor in establishing benefit levels and plan rates. In the absence of a predictable right to recovery, plans will be forced to protect against the resulting risk by raising rates or decreasing benefits for all participants. Plan participants that honor their obligations under plan reimbursement provisions should not be forced to bear these costs.[15]

Second, to counter an erosion of their reimbursement rights, plan providers may be forced to adopt alternate approaches that shift greater burdens to plan participants. Thus, one option for plan providers faced with escalating costs would be to defer or delay payment of claims for medical expenses related to third-party negligence until the accident liability issues have been fully resolved or until third-party litigation has concluded. *See, e.g.*, *Kress*, 391 F.3d at 568 ("Since third-party accident and sickness benefits are not even covered by the Fund, nor required by ERISA, it makes little sense to argue that ERISA precludes imposing conditions on the receipt of benefits that are in effect an interest-free loan."); *McIntyre v. Carpenters Health and Sec.*

14. Application of the "made whole" and "common fund" rules advocated by ATLA would exacerbate this problem by further reducing recoveries and engendering litigation at both the state and federal level.

15. Of course, the game of cat and mouse that plan providers are required to play with participants and trial lawyers in the current legal environment carries costs unto itself.

Trust, __ F. Supp. 2d __, No. CO5-5724FDB, 2006 WL 118249, at *9 (W.D. Wash. Jan. 13, 2006) ("Nothing required Jamie McIntyre to accept the reimbursement option; she was free to reject the advancement of benefits. But where she did accept the advanced benefits offer, and then recovered against the third party, it was not wrongful for the Trust to seek to recoup the advanced benefits and to cease making further advancements.").

Third, to secure the certainty of recovery that judicial misinterpretation of Section 502(a)(3) would deny, plans could choose to offset future benefits. In other words, a plan could add language to an existing subrogation provision permitting the fiduciary to deny future benefits equal to the amount of money that should have been reimbursed under the terms of the plan. *See, e.g., McIntyre*, __ F. Supp. 2d __, 2006 WL 118249, *9 (explaining that "the Trust is authorized to cease advancement of benefits if there is a reasonable basis to believe that the parties involved will not honor the terms of the reimbursement provisions"). Or, more drastically, plan sponsors might be compelled to amend their plans to exclude coverage for medical expenses related to negligent third-party claims. *See, e.g., Ryan by Capria-Ryan v. Federal Express Corp.*, 78 F.3d 123, 127 (3d Cir. 1996) ("ERISA neither requires a welfare plan to contain a subrogation clause nor does it bar such clauses or otherwise regulate their content.") (citing *Land v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Health and Welfare Fund*, 25 F.3d 509, 514 (7th Cir. 1994)).

The net consequences of all of these possible outcomes would be higher plan costs that will be shifted to all plan participants, including plan participants that honor the terms of their agreements. This unnecessary and unwarranted shift of risk allocation would come at time when employers are finding it increasingly difficult to provide benefits to their employees. *See, e.g.*, Henry J. Kaiser Family Foundation,

The Uninsured: A Primer, Key Facts About Americans Without Health Insurance, Nov. 10, 2004, http://www.edpma.com/files/public/unisuredprimer.pdf (explaining that approximately 38% of all workers are employed by smaller businesses and that less than 2/3 of these small businesses offer health benefits to their employees). As the National Coalition on Health Care has explained, "[r]apidly rising health insurance premiums is the main reason cited by all small [businesses] for not offering coverage. Health insurance premiums are rising at extraordinary rates." National Coalition on Health Care, Facts on Health Insurance Coverage, available at http://www.nchc.org/facts/ coverage.html ("Over the past five years the average annual increase in inflation has been 2.5 percent while health insurance premiums have escalated an average of 11.4 percent annually.") (citing Henry J. Kaiser Family Foundation., Employee Health Benefits: 2004 Annual Survey, September 9, 2004, http://www.kff. org/insurance/7148/index.cfm.[16]

In turn, increased costs inevitably will lead to a reduction in the number of individuals that are able to afford insurance. As one report explained, a one-percent increase in plan costs "results in a potential loss of insurance coverage for about 315,000 individuals" over a five-year span. *See* Health Econs. Practice Group, Barents Group, LLC, *Impacts of Four Legislative Provisions on Managed Care Consumers*: 1999-2003, http://www.nchc.org/facts/facts%20 sheets%20 coverage.pdf. The Court should not endorse a rule that allows some participants to benefit from inequitable practices to the

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16. And, even when employers do offer coverage, employees increasingly cannot "afford their portion of the premium. Employee spending for health insurance coverage (employee's share of family coverage and deductibles) has increased 126 percent between 2000 and 2004." *See* National Coalition on Health Care, Facts on Health Insurance Coverage, http://bcbshealthissues.com/relatives/17280.pdf.

detriment of all plan participants, because it is impossible to reconcile such a rule with the plain language of Section 502(a)(3), this Court's precedents, or the core purposes of ERISA.

CONCLUSION

For the reasons set forth herein, the judgment of the court of appeals should be affirmed.

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In The
Supreme Court of the United States

JOEL SEREBOFF and MARLENE SEREBOFF,

Petitioners,

v.

MID-ATLANTIC MEDICAL SERVICES, INC.,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit

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STATEMENT OF INTEREST

The Society for Human Resource Management ("SHRM") is the world's largest association devoted to human resource management.[1] Representing more than 200,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters and members in more than 100 countries. SHRM's membership comprises HR professionals who work for employers that sponsor health plans for their employees.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

This case involves a plan fiduciary's attempt to recover under ERISA the medical expenses advanced by the

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[1] Pursuant to Supreme Court rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* and their members, made a monetary contribution to the preparation or the submission of this brief. The brief is filed with the consent of the parties and copies of the consent letters have been filed with the Clerk.

plan under its subrogation/reimbursement provisions. The court decision will have a direct impact on a substantial number of the members of SHRM and the Chamber. From the largest to the smallest of businesses, those that sponsor health plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA") containing subrogation and reimbursement provisions have a vital interest in the outcome of this case.

SUMMARY OF ARGUMENT

This case involves the extent of equitable relief available to a fiduciary under ERISA §502(a)(3)[2] to enforce the reimbursement and subrogation provisions of an employer-sponsored health plan. The Fourth Circuit (following the lead of the Fifth, Seventh, and Tenth Circuits)[3] has held that a plan fiduciary may seek under ERISA equitable restitution and impose a constructive trust or equitable lien on a portion of the settlement funds that are within the possession and control of a participant. The Sixth and Ninth Circuits have reached the opposite conclusion, finding that the plan fiduciary cannot seek a constructive trust or equitable lien on a participant's settlement proceeds that are held in an identifiable account since the claim simply seeks to enforce a contractual provision in a

[2] 29 U.S.C. §1132(a)(3).

[3] *See Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan v. Willard*, 393 F.3d 1119 (10th Cir. 2004); *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, et al.*, 354 F.3d 348 (5th Cir. 2003); *Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Varco*, 338 F.3d 680 (7th Cir. 2003).

plan document to require the payment of money which is a classic action at law, not an equitable claim.[4]

The Sixth and Ninth Circuits' rationale must be rejected. The Fourth Circuit decision was properly decided in accordance with Supreme Courts' rulings construing the remedies available under ERISA §502(a)(3). The circumstances of the case warrant the imposition of a constructive trust or equitable lien remedy which was available in the traditional equity courts. The meaning of "appropriate equitable relief" as described by the majority of the Supreme Court embraces the imposition of a constructive trust or equitable lien on monies received from a tortfeasor being held in an account under the control of the participant. The plan fiduciary is seeking an equitable right based on unjust enrichment to some or all of the money held in the account which is derived solely from the participant's state court settlement with the tortfeasor. This right is well recognized in traditional equity courts and is independent of any contractual rights between the parties. Equitable relief is particularly appropriate here because plan fiduciaries do not have a right under ERISA to enforce the terms of the plan through direct recovery from the participant, so there is no adequate remedy at law.

Subrogation and reimbursement provisions are found in, and used by, virtually all insured and self-funded health plans. The denial of the enforcement of subrogation/reimbursement provisions contained in most health plans will result in increased costs for the provision of medical

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[4] *Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (6th Cir. 2004); *Westaff (USA) Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002).

benefits to plan participants and beneficiaries. With medical costs already skyrocketing, an adverse ruling in this case will encourage more employers to *not* offer healthcare plans or pass the increased costs onto participants in the plan.

Further, if plan fiduciaries are unable to enforce these subrogation/reimbursement provisions, plan sponsors will amend their plans to eliminate benefits for injuries and illnesses arising out of accidents for which third parties may be liable. In the event that such benefits are not provided, plan participants and beneficiaries will have to either pay medical providers directly for such services or wait to pay medical providers from their recoveries from tortfeasors. This would impose uncertainties and hardships on participants and beneficiaries and result in a less efficient means of paying medical benefits.

Finally, if *Sereboff* is overturned, plan fiduciaries will be forced into state courts to attempt to enforce the plans' subrogation and reimbursement clauses. The result of such efforts will vary depending on the jurisdiction in which the claims are heard, contrary to one of the principal purposes of ERISA which is to promote uniformity in administration of ERISA plans.

In sum, the Fourth Circuit's decision should be upheld. Plan fiduciaries do have a cause of action under ERISA §502(a)(3) for restitution to prevent unjust enrichment by the imposition of a constructive trust or equitable lien on the participant's settlement proceeds held in a separate identifiable account under the participant's actual or constructive control. To hold otherwise would: (1) hinder the enforcement of subrogation/reimbursement provisions; (2) allow plan participants and beneficiaries to

defeat the plan's interest in being reimbursed by the tortfeasor whose actions caused the illness or injury; (3) create an administrative burden for plan fiduciaries by requiring them to go into state court and bring suits against potential liable third parties; (4) encourage plan sponsors to eliminate coverage now extended to participants for their convenience; and (5) increase health plans costs, which may result in discouraging employers to maintain plans or shifting the additional costs to participants and beneficiaries.

ARGUMENT

A. THE REMEDIES OF CONSTRUCTIVE TRUST AND EQUITABLE LIEN CONSTITUTE APPROPRIATE EQUITABLE RELIEF UNDER ERISA §502(a)(3).

The Supreme Court has interpreted ERISA §502(a)(3) in at least four cases. In *Mertens v. Hewitt*,[5] the participants' cause of action against the nonfiduciary was maintained under §502(a)(3) to obtain "other appropriate equitable relief" to redress fiduciary violations of ERISA. The Court held that ERISA does not authorize suits for money damages against the nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty. The Court opined that the relief sought (*i.e.*, monetary damages against the nonfiduciary for losses to the plan) was *not* a remedy *traditionally viewed as equitable*, since money damages are the classic form of legal relief. Further, the Court declined to rule that *all* relief available for

[5] 508 U.S. 248, 254-57 (1993).

breach of trust that could have been obtained in a court of equity was available under §502(a)(3). To read the statute otherwise would "render the modifier – equitable – as superfluous."[6] The Court noted that at common law, equity courts could establish legal rights and grant legal remedies for breach of trust, as well as grant traditional equitable relief (such as injunction and restitution).

The second case addressing the parameters of §502(a)(3) relief is *Varity Corp. v. Howe*,[7] wherein the Court agreed that a claim for individual relief against fiduciaries to redress breaches of fiduciary duties could be maintained under §502(a)(3). In so holding, the court described the language in §§502(a)(3) and 502(a)(5) as two "catchalls," acting as a "safety net" and "offering appropriate equitable relief for injuries caused by violations that §502 does not elsewhere adequately remedy."[8] The Court did not elaborate, however, on what relief would be available to the individual plaintiffs to redress the breaches of fiduciary duty.

In *Harris Trust and Savings Bank v. Salomon Smith Barney*,[9] the Court permitted a cause of action under §502(a)(3) against a nonfiduciary party-in-interest broker to obtain "appropriate equitable relief" to redress a violation of the prohibited transaction rules of ERISA. The Court found that a §502(a)(3) cause of action was appropriate to redress violations or enforce any provisions of ERISA or an

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[6] *Id.* at 258.

[7] 516 U.S. 489 (1996).

[8] *Id.* at 512.

[9] 530 U.S. 238 (2000).

ERISA plan and the only limit in §502(a)(3) is the "appropriate equitable relief" caveat. In so finding, the Court relied on the common law of trusts, which allowed an action for restitution of property or disgorgement of proceeds and profits through the imposition of a constructive trust in situations where property was obtained by another by fraud or other means which would render it unconscionable for the holder of legal title to retain and enjoy the beneficial interests.[10]

The final case, which is a prequel to the case below, is *Great West Life & Annuity Insurance Co. v. Knudson*.[11] The court declined to allow a plan fiduciary to enforce the plan's subrogation and reimbursement provision against a plan participant under ERISA §502(a)(3). The court held that: (1) "equitable relief" in §502(a)(3) refers only to those categories of relief that were *typically available in equity*;[12] (2) "an injunction to compel the payment of money past due under a contract or specific performance of past due monetary obligation was *not* typically available in equity"[13]; and (3) not all relief characterized as restitution was available in equity – *i.e.*, it is a legal remedy when ordered in a case at law and an equitable remedy when ordered in an equity claim.[14]

The Supreme Court proceeded to provide a framework for courts to determine which type of case it may be.

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[10] *Id.* at 250-51.

[11] 534 U.S. 204 (2002).

[12] *Id.* at 209-10 (*citing Mertens*).

[13] *Id.* at 211.

[14] *Id.* at 212, *citing* Judge Posner's decision in *Reich v. Continental Casualty Co.*, 33 F.3d 754, 756 (7th Cir. 1994).

Courts were instructed to ascertain *the basis for the claim* and *the nature of the underlying remedies sought.*[15] If plaintiff's claim was to obtain a judgment imposing personal liability on defendant to pay money, it was restitution at law. If, on the other hand, it was an action in the form of a constructive trust or an equitable lien, it was restitution in equity and *a court could order the defendant to transfer title to property or give a security interest to plaintiff in money or property in defendant's possession which in good conscience belonged to Plaintiff.*[16] However, in *Knudson*, the Supreme Court declined to impose a constructive trust or an equitable lien on settlement proceeds because the funds to which the plan fiduciary sought entitlement were not in the participant's possession, but had been placed in a special needs trust and given to the attorney.[17]

The Supreme Court's discussion in *Knudson* delineating the circumstances in which restitution could be characterized as equitable was derived from treatises describing equity actions at the time of the divided bench.[18] In traditional equity courts, where a defendant has gained a benefit that in good conscience belonged to plaintiff, plaintiff could assert a claim for *unjust enrichment* and seek restitution in the form of a constructive trust or

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[15] *Id.* at 213.

[16] *Id.* at 213-14.

[17] *Id* at 214.

[18] *Knudson*, 534 U.S. at 213-14, *citing* 1 D. Dobbs, *Law of Remedies* §4.3(1) at 587-88 (2d ed. 1993), *Restatement of Restitution* §160, cmt. a, at 641-42 (1936); and 1 G. Palmer, *Law of Restitution* §1.4 at 17; §3.7 at 262 (1978).

equitable lien.[19] Plaintiff would seek these remedies to require disgorgement of *specific* real or personal property unjustly held by the defendant. The constructive trust remedy would provide an *in personam* order requiring the defendant to turn over property to a plaintiff.[20] Prior to making the order, the court would decide if restitution was proper, and, if so, would declare the defendant to be a constructive trustee and order him as trustee to transfer the property.[21] Constructive trust may only be had if defendant can be said to possess the property which in good conscience belongs to plaintiff.[22] If the property is sold and the money dissipated, then plaintiff would only have legal relief.[23]

The difference between legal and equitable restitution is the focus of the remedy. Legal restitution is a general claim for money to recoup plaintiff's losses (*i.e.*, plaintiff is seeking a judgment imposing personal liability on defendant for money owed), while equitable restitution is a claim for return of specific property, including money, that in good conscience belongs to plaintiffs.[24] Petitioners even

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[19] *Supra* fn. 17. *See also* 4 J. Pomeroy, *Equity Jurisprudence* §1047 at 101-02 (Symons 5th ed. 1994) (1941) An equitable lien is a special form of constructive trust and would be applied where the plaintiff was not claiming rightful ownership over the entire *res* sought for attachment. The plaintiff receives a security interest in the property *See* 1 D. Dobbs, *Law of Remedies* §4 3 at 249.

[20] 1 D Dobbs, *Law of Remedies* §4 3(2) at 590-91 (2d ed. 1993).

[21] *Id* at 591.

[22] 1 D. Dobbs, *Law of Remedies* §4.3(2) at 242 (1973).

[23] 1 D. Dobbs, *Law of Remedies* §4.3(2) at 591 (2d ed. 1993)

[24] 1 D. Dobbs, *Law of Remedies* §2.6(3) at 157 (2d ed. 1993), *Knudson*, 534 U.S. at 213-14; *Health Costs Controls of Ill v Washington*, 187 F3d 703, 710-11 (7th Cir. 1999) (discussing the differences between legal and equitable restitution).

concede that "a breach of contract may occasionally entitle plaintiff to seek equitable relief, in the form of money."[25]

The Fourth Circuit in *Sereboff* properly found that the basis of the plaintiff's claim and the nature of remedy were equitable. The court upheld the equitable restitution claim finding that plaintiff was seeking the settlement funds which properly belonged to the plan and those funds were specifically identifiable and in the defendants' possession.[26] The court rejected the Ninth and Sixth Circuits' "more restrictive view" of what constituted "other appropriate equitable relief."[27]

Petitioners argue that equitable remedies of constructive trusts and equitable liens are not available because plaintiff was not seeking the return of particular funds that the plan paid to them and that they retain, or the profits that they may have made from the use of those funds, but rather is seeking to recover new money paid to plaintiff by third parties.[28] A constructive trust is not limited to situations where plaintiff is seeking the *res* personally given to defendant, but encompasses property which defendant takes that belongs to plaintiff, even though plaintiff never held title.[29] Petitioners misconceive the property interest that the plan fiduciary was asserting belonged to the plan. The plan fiduciary was not seeking the monies paid to medical providers. Rather, the property

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[25] *See* Petitioners' Brief at *9.

[26] *Mid-Atlantic Medical Services, LLC v. Sereboff*, 407 F.3d 212, 218-19 (4th Cir. 2005).

[27] *Id.* at 219-20, fn. 7 (relying on the reasoning in *Bombardier*, 354 F.3d at 358 n.43 and *Willard*, 393 F.3d at 1125).

[28] *See* Petitioners' Brief at *20-21.

[29] 1 D. Dobbs, *Law of Remedies* §4.3(2) at 590 (2d ed. 1993).

interest in which the plan claimed to have a beneficial interest was the settlement monies received from a third party or insurer. This is exactly what the plan subrogation reimbursement provision provided.[30] When petitioners accepted the payment of medical expenses relating to their accident and then sued the tortfeasor in state court, they agreed to hold the recovery (or a portion thereof) in trust for Respondent MAMSI. Thus, the funds which the Fourth Circuit awarded to the plan were clearly "traceable" and recoverable through the imposition of a constructive trust or equitable lien.[31]

Moreover, this equitable interest does not rest only on the contractual relations of the parties, but on the court's determination that "in good conscience," the settlement funds belonged to the plan to prevent unjust enrichment. The plan fiduciary agreed to make payment in reliance on petitioners' misrepresentation that the funds petitioners received from the tortfeasor would be held for the benefit of the plan.

Petitioners also argue that the equitable remedies cannot be granted in this case because the plan fiduciary has an adequate legal remedy.[32] Although equity courts

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[30] *See* Joint Appendix Exhibit 1 to Joint Stipulation of Facts at 75.

[31] *See Health Costs Controls of Ill. v. Washington*, 187 F.3d at 710-11 (plan fiduciary is seeking a constructive trust in participant's claim to tort settlement held in an escrow account); *Wal-Mart Stores Health and Welfare Plan v. Wells*, 213 F.3d 398, 401 (7th Cir. 2000) (the question is whether the participant or the plan is the beneficial owner of the monies held in a lawyer's escrow).

[32] *See* Petitioners' Brief at *23. Petitioners assert that the plan administrator could have directly intervened as a subrogee in the Sereboffs' state court action to collect the monies owed to it. *See* Petitioner's Brief at *21, fn. 8. The remedy of subrogation is *equitable*,

(Continued on following page)

would not normally award relief if plaintiff had an adequate remedy, the treatises on remedies indicate that, even when a legal remedy may be available, a plaintiff may maintain an equitable claim if the remedy is more advantageous.[33] In the case below, the Fourth Circuit's affirmation of the equitable remedy of constructive trust or equitable lien was clearly preferable because, under the facts of the case, it was the *only way* the plan fiduciary could obtain monies which in good conscience belong to the plan. Thus, there is no reason to deny the remedy sought

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not legal. *See* 1 D. Dobbs, *Law of Remedies*, §4.3(1) at 587-88 (2d ed. 1993) (listing subrogation as a "major restitutionary remedy in equity"), §4.3(4) at 604 ("subrogation is another equitable remedy in which trading is used to prevent unjust enrichment and to give effective relief to the plaintiff"); *Scholastic Corp v Najah Kassem & Casper & De Toledo LLC*, 389 F. Supp 2d 402, 413 (D. Conn. 2005) (subrogation is a "creature of equity" and is "enforced solely for the purpose of accomplishing the ends of substantial justice"). In *Scholastic Corp.*, the court permitted an employer to proceed with a claim for an equitable lien over funds held in a designated account that had been paid by third party tortfeasors in settlement of litigation over an accident for which the employer paid the injured employee's medical benefits pursuant to its ERISA plan. The court found that the employer had a subrogation right under the terms of the plan to reimbursement of the medical benefits expended by the plan in the event that the employees recovered against a third party at fault. *See id.* at 412. The court further found that such a right was inherently equitable, and that an action for an equitable lien was a proper vehicle for enforcing the subrogation right independent of any contract action the employer may also be entitled to bring. *See id.* at 412-14.

[33] *See, e.g.*, 1 D. Dobbs, *Law of Remedies* §4 1(1) at 556 §4.3(2) at 595-96 (2d ed. 1993) (some authorities support the view that a claim for a constructive trust may be pursued even if the legal remedy is adequate and even if the trust would yield only money that could be recovered at law); 4 J. Pomeroy, *Equity Jurisprudence* §1047 (Symons 5th ed. 1994) (1941) (constructive trust may be applied "wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer").

by the plan administrator because ERISA §502 does not elsewhere provide an adequate remedy.

B. REIMBURSEMENT PROVISIONS SERVE IMPORTANT PURPOSES WHICH BENEFIT EMPLOYERS, PARTICIPANTS AND BENEFICIARIES.

Subrogation/reimbursement provisions are found exclusively in, and used by, both insured and self-funded health plans. They are cost-shifting measures. Reimbursement and subrogation provisions operate very differently, but essentially serve the same purpose (*i.e.*, to prevent unjust enrichment). Reimbursement provisions require the participant or beneficiary to reimburse the plan for medical expenses paid by the plan in the event there is a recovery for the same injuries from a responsible third party through judgment or settlement. Subrogation, on the other hand, allows the plan to step in the shoes of the injured participant and sue the tortfeasor directly. Subrogation is a more expensive alternative for plan fiduciaries since the plans would have the burden of suing the tortfeasor and proving the liability for the injury.[34]

Subrogation/reimbursement provisions are similar to other cost-shifting measures commonly found in health plans. For example, plan administrators have to determine benefits in dual or triple coverage situations ("coordination of benefits") and also coordinate with Medicare

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[34] *See* R. Goff & G. Jones, *The Law of Restitution* §3-004 at 1230 (6th ed. 2002); 16 L. Russ, *Couch on Insurance*, §222.22 at 222-13 to 222-14 (3d ed. 2000) (noting distinctions among subrogation, liens and assignments).

under the Medicare Secondary Payer Rules. The purpose for these rules is to shift the costs of the medical expenses on the plans to other persons or entities who are primarily liable for the expenses.

The subrogation/reimbursements provisions (and the other coordination of benefit provisions) serve important goals, including: (1) preventing participants and beneficiaries from retaining recoveries which were meant in part to reimburse for medical expenses already paid by the plan; (2) shifting the costs to the tortfeasor or another responsible party who is primarily liable for those costs; and (3) preventing participants, beneficiaries and others from defeating the plan's recovery of the advanced medical expenses by creatively structuring settlements to foreclosure recovery of those expenses.

When participants bring claims to recover for injuries or illnesses sustained as a result of a liable third party, such claims almost uniformly seek recovery of damages for the medical expenses that the plans have paid or may be obligated to pay to the plaintiffs in the future. When funds are recovered through judgments or settlements, it can reasonably be assumed that they include amounts for all or part of the medical expenses incurred or anticipated to be incurred in the future by the injured participant. Thus, the imposition of a constructive trust or equitable lien on the settlement recoveries prevents double recoveries by participants for medical expenses.

Moreover, another policy underlying the enforcement of subrogation and reimbursement provisions is to assure that the tortfeasors or other responsible parties, rather than the plans, employers, participants and beneficiaries,

would ultimately bear the medical expenses resulting directly from their wrongful conduct.

Allowing enforcement of these provisions would likewise discourage participants through post-settlement maneuvers from attempting to fashion settlement agreements so as to exclude therefrom any recovery for the medical expenses paid by the plans, and for which plaintiffs originally demanded recovery.

Most importantly though, enforcement of subrogation/reimbursement provisions serves to reduce the health plans' and insurers' costs of providing health benefits and, thus, conserve limited plan funds.[35] Unfortunately, even with cost saving measures in place, the skyrocketing costs of employer-sponsored health coverage in this country has resulted in fewer employers extending health coverage and fewer employees being covered.[36]

Millions and potentially billions of dollars are recouped annually by health plans.[37] If this court were to

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[35] *Varity*, 516 U.S. at 497.

[36] The Employer Health Benefits 2005 Annual Survey reports that from 2000 through 2005, average premiums for family coverage increased by 73% (for both insured and self-funded plans) and, in 2005, the average annual premium for a family of four was $10,880.00, which almost equals the full-time earnings of a minimum wage worker. The Henry J. Kaiser Family Foundation & Health Research & Education Trust, *Summary of Findings*, Employer Health Benefits 2005 Annual Survey 1 (2005), *available at* http://www.kff.org/insurance/7315/sections/upload/7316.pdf. Additionally, over the past five years, the percentage of employers offering health benefits have decreased from 69% to 60% and the percentage of workers covered has fallen from 63% to 60%. *See id.*

[37] One of the largest private healthcare claims recovery services in the United States recovered $239.9 million in health claims in 2003. *See Trover Solutions, Inc., Form 10-K (FY 2003)* at 29. Based on the recoveries made by this service, it is estimated that more than $1 billion is recovered annually on behalf of all plans.

hold that §502(a)(3) does not permit enforcement of plan reimbursement/subrogation provisions to recover amounts paid out to participants injured by liable third parties, it will inevitably adversely impact the financial viability of health plans, increase the costs of providing health benefits, and cause employers to: (1) drop coverage altogether; (2) decrease benefits provided to all employees; or (3) pass those increased costs onto workers.

C. IF PLAN REIMBURSEMENT AND SUBROGATION PROVISIONS CANNOT BE ENFORCED, PLAN SPONSORS MAY SIMPLY AMEND PLANS TO EXCLUDE BENEFITS FOR WHICH THIRD PARTIES MAY BE LIABLE.

Petitioners Joel and Marlene Sereboff recovered $750,000 in settlement of a personal injury action against third party tortfeasors for injuries sustained in an automobile accident. The Sereboffs were covered at the time of the accident by MAMSI Life and Health Insurance PPO Plan, and the plan paid nearly $75,000 in medical benefits on behalf of the Sereboffs as a result of the accident. The plan contained a subrogation provision giving MAMSI the right to recover medical benefits paid to participants as a result of any injury caused by a third party. Though MAMSI made a formal demand on the Sereboffs for recognition of the plan's subrogation rights during the settlement process, the Sereboffs refused to comply with the subrogation provision and did not reimburse the plan. The Court of Appeals for the Fourth Circuit affirmed the District Court's award reimbursing the plan out of the monies recovered in settlement of the Sereboff's personal injury action.

Plans provide for the payment of participants' medical expenses relating to illnesses and injuries for which a third party may be liable as a convenience to their participants and to assist in prompt payments to medical providers. If this court overturns the *Sereboff* decision, plan sponsors will amend their health plans to discontinue this accommodation and exclude payments for illnesses or injuries for which third parties may be liable. The employers' decisions regarding the design of the plan itself – *e.g.*, who is entitled to benefits, in what amounts and how the benefits are calculated – are settlor functions.[38] "[E]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify or terminate welfare plans."[39] Indeed, ERISA does not require that an employer provide any particular benefits or any benefits at all.[40] Thus, employers may legitimately, without incurring any fiduciary liability, amend their health plans to exclude the payment of benefits for which a third party may be liable.

Unless the participant is able to prove to the plan fiduciary that the exclusion did not apply, the participant would be primarily responsible for the medical bills. For example, in this case, $74,869.37 of the Sereboffs' medical bills were paid directly by the plan. Likewise, in the

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[38] When employers undertake to adopt, modify or terminate plans, their actions are analogous to settlors of a trust. *See Hughes Aircraft Co v. Jacobsen*, 525 U.S 432, 443-44 (1999); *Lockheed Corp v. Spink*, 517 U.S. 882, 889-90 (1996); *Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

[39] *Curtis-Wright*, 514 U.S. at 78 ("ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits").

[40] *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983).

Knudson case, medical bills amounting to $411,157.11 were paid by the insurance plan. If the health plans expressly excluded these benefits, the Sereboffs and the Knudsons would have had to pay the medical bills out of their own pockets.

If a participant was unable (or unwilling) to pay the medical expenses, the expenses would not be paid until he/she was able to recover from the liable third party. Prior to recovery, the unpaid medical providers may bring suits against the participants. This would result in participants being burdened by state court collection actions and providers not being paid in a timely manner, causing even more havoc on the court system.[41] Upholding the *Sereboff* decision and allowing plan fiduciaries to obtain recoupment of monies in limited circumstances will facilitate, rather than impede, the system of claims payments.

D. IF FIDUCIARIES SEEK TO ENFORCE THE PLANS' REIMBURSEMENT AND SUBROGATION PROVISIONS IN STATE COURTS, THEIR CLAIMS MAY BE DENIED AS PREEMPTED BY ERISA OR SUBJECT TO THE VAGARIES OF STATE LAWS.

Whether a plan fiduciary can sue for damages for breach of contract or otherwise seek to enforce the plan's subrogation and reimbursement provisions under state law without running afoul of ERISA's broad preemption

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[41] *See, e.g., McIntyre v. Carpenters Health & Security Trust of Western Washington*, 2006 U.S. Dist. LEXIS 3759 (W.D. Wash. 2006) (participant sued plan and plan administrator requesting an order for payment of claims excluded under plan).

provisions was left open in *Knudson*.[42] Since *Knudson*, the courts' rulings on this issue have been mixed. Some courts have held that state law claims by plan fiduciaries are preempted, even though there may be no available federal remedy.[43] In at least three cases, federal courts have held that participants' state law declaratory actions to determine the rightful ownership of tort recoveries are preempted by ERISA (although the state courts may have concurrent jurisdiction with federal courts to decide them).[44] A number of courts, on the other hand, have entertained state law claims by plan fiduciaries seeking to enforce reimbursement and subrogation plan provisions.[45]

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[42] 534 U.S. at 220

[43] *See, e.g., Infinity Insurance Companies v. Copeland*, 2005 U.S. Dist. LEXIS 30018 at 3 (M.D. Ga. November 18, 2005) (insurer's subrogation claim is based on and arises out of ERISA and, thus, is under the exclusive jurisdiction of federal courts); *Liberty Northwest Insur. Corp. v. Kemp*, 192 Ore. App. 181, 85 P.3d 871 (Ct. App. Ore. 2004) (ERISA preempts the insurer's state common-law breach of contract claim because it references an ERISA plan and interferes with one of Congress's most important objectives in enacting ERISA), *MEBA Medical & Benefits Plan v. Tracey Lago*, 867 So. 2d 1184 (Ct. App. Fla. 2004) (trust's action is preempted because it relies upon state law for alternative enforcement of its claim for reimbursement of benefits); *Board of Trustees of San Diego Electrical Health and Welfare Trust*, 2003 Cal. App. Unpub. LEXIS 2377 (Ct. App. Cal. 2003) (same); *Community Insurance Co. v. Morgan*, 54 Fed. Appx. 828 (6th Cir. 2002) (plan fiduciary's action seeking a declaration under state law of its entitlement of funds based on its subrogation interest is preempted).

[44] *See McIntyre v. Carpenters Health and Security Trust of Western Washington*, 2006 U.S. Dist. LEXIS 3759 (W.D. Wash. 2006), *Liming v. Check Free Services Corp.*, 2005 U.S. Dist. LEXIS 39155 (D. Ariz. 2005); and *Arana v. Ochsner Health Plan*, 338 F.3d 433 (5th Cir. 2003) (en banc).

[45] *See, e.g., Uber v. TIG Specialty Inc. Co.*, 2003 Mich. App. LEXIS 262 (Ct. App. Mich. 2003) (court held that plan fiduciary could assert a lien on the settlement proceeds recovered in the participant's state law

(Continued on following page)

If this Court were to reverse *Sereboff*, it is uncertain whether plan fiduciaries could maintain state court actions to enforce the plan's subrogation and reimbursement rights. If they cannot bring state actions because of ERISA preemption, then there will be no enforcement remedy. If the plan fiduciaries can maintain state claims, the plans would be subject to varying laws. State court actions may or may not be successful depending upon the jurisdictions in which the actions are brought. The various state courts may apply federal law or they may apply unique state statutes and common law. This would frustrate Congress's primary goal in enacting ERISA – *i.e.*, uniform administration of employee benefit plans, including uniform legal obligations.

Several of this Court's opinions have emphasized that Congress intended to enable employers "to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits,"[46] and that such "[u]niformity is impossible, however, if plans are subject to different legal obligations in different states."[47] Moreover, plan

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suit against tortfeasor's insurer); *Palmerton v. Associates' Health and Welfare Plan*, 260 Wis 2d 179, 659 N.W. 2d 183 (Ct. App. 2003) (affirmed the award of a judgment based on state law subrogation claim to the plan); *Brodzik v. Szpakowicz*, 2002 Conn. Super. LEXIS 3417 (Sup. Ct. Conn. 2002) (approved the plan's lien and ordered it paid from the judgment); *Hamrick's Inc. v. Roy*, 115 S.W. 3d 468 (Ct App. Tenn. 2002) (affirmed the plan's judgment against the participant and her attorney in a state law suit to enforce reimbursement agreement).

[46] *Fort Halifax Packing Co. v Coyne*, 482 U.S. 1, 9 (1987).

[47] *Egelhoff v. Egelhoff*, 432 U.S. 141, 148 (2001). *See also FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990) ("[t]o require plan providers to design their programs in an environment of differing state regulations

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administration would become increasingly inefficient and costly if plans are forced in each and every potential third party liability claim to go into state courts and file actions against potential liable third parties to recover advanced medical expenses.

CONCLUSION

The *Sereboff* decision (following the lead of other Circuits) was correctly decided under this Court's *Knudson* opinion. The traditional equity courts were empowered to deliver *justice* when relief at law was inadequate or not as favorable. Providing plan fiduciaries with an equitable remedy under ERISA §502(a)(3) to enforce the terms of the plan and to prevent unjust enrichment will encourage the participants to live up to their commitments, promote Congress's goal of uniformity in administration, and inevitably reduce the costs of providing health care costs.

For the above reasons, *Amici* respectfully request that this Court affirm the decision of the Court of Appeals for the Fourth Circuit.

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would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits").

Respectfully submitted,

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No. 05-260

IN THE

Supreme Court of the United States

JOEL SEREBOFF AND MARLENE SEREBOFF,

Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* SOUTHWEST CARPENTERS HEALTH & WELFARE TRUST (FKA CARPENTERS HEALTH & WELFARE TRUST FOR SOUTHERN CALIFORNIA) IN SUPPORT OF RESPONDENT MID ATLANTIC MEDICAL SERVICES, INC.

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INTEREST OF *AMICUS CURIAE*[1]

The Southwest Carpenters Health & Welfare Trust (*fka* Carpenters Health & Welfare Trust for Southern California) ("Trust") is a multi-employer welfare benefit plan established pursuant to a collective bargaining agreement. The Trust provides benefits to approximately 88,000 eligible carpenters and their families, and paid approximately $189 million in health and welfare benefits in 2005. Like Respondent Mid Atlantic Medical Services, Inc. ("Mid Atlantic"), the Trust is governed by the Employee Retirement Income Security Act ("ERISA"). The issue raised here is of keen importance to the Trust, its Board of Trustees (who, like Mid Atlantic, are fiduciaries under ERISA), and the thousands who depend on the Trust for crucial, often lifesaving health benefits. The resolution of this issue will directly impact the financial ability of the Trust to provide health benefits under conditions in which the cost of healthcare continues to spiral constantly higher.[2]

According to recent U.S. Department of Labor figures, approximately 137 million people depend on private sector

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1. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from all parties consenting to the filing of this brief are being submitted herewith.

2. On January 31, 2005, the Trust petitioned for a writ of certiorari from the decision in *Carpenters Health & Welfare Trust v. Vonderharr*, 384 F. 3d 667 (CA9 2004). The Trust sought review of essentially the same reimbursement issues now before this Court. While the petition was pending, the Trust settled its dispute with the participant. As a result, on November 28, 2005, the Court denied the Trust's petition. The issues cited in the Trust's petition in *Vonderharr* remain unresolved.

employer-sponsored health plans covered by ERISA, which struggle to provide health benefits despite a rising tide of healthcare costs that constantly threatens millions of Americans workers with a reduction or loss of their crucial health benefits.[3] The terms of many of these plans, including the Trust, contain reimbursement provisions intended to help the plans meet this massive healthcare burden by requiring participants to reimburse their plans for the cost of a participant's healthcare when the participant actually recovers those costs from the third party responsible for the plan's expenditures.

Apart from defeating the plans' efforts to place the burden of healthcare costs on the third parties that caused the need for that care, the reimbursement rules of the Sixth and Ninth Circuits which erect a per se ban on reimbursement also create a manifest unfairness to other plan participants who depend on the plans for healthcare benefits. Participants like the Sereboffs unjustly reap a double recovery by first receiving payments made by the plans on their behalf to healthcare providers, and then by keeping the amounts actually paid by third parties for the healthcare costs that were *already paid* by the plan.[4] Like the accidents that cause

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3. The proposition that healthcare costs are skyrocketing is beyond dispute. According to an AON Consulting study, healthcare was the "top employee benefits challenge" in 2003. AON projected that health and welfare plans could sustain an eight percent "affordable limit" in the increase of healthcare costs. However, the study projected that healthcare costs were likely to increase at a staggering 14 percent rate. In real numbers, this means that, by 2008, plans will be able to afford to spend only an average of $7,650 per employee, but must somehow scramble to pay the $10,600 per employee figure that is projected for that year.

4. *See* John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-*

(Cont'd)

healthcare expenditures, this double recovery also has victims — other plan participants who are unable to obtain benefits because limited plan resources have been spent where there was a third party that in fact paid for those expenses, but the payment was kept by the participant. The district court in *Vonderharr* eloquently expressed the common sense impropriety of such a result:

> Defendants did not seek to benefit other ERISA participants and beneficiaries of the plan. By retaining the money expended by [the Trust] on their behalf while receiving funds from the underlying state court settlement, [defendants] have actually reaped a windfall at the expense of all. . . . Ultimately the legal question decided in this case will benefit only a subset of participants and beneficiaries. Moreover, as discussed above, Defendants did not seek to vindicate a right under ERISA as much as they sought to secure a windfall from [the Trust's] inability to obtain reimbursement. [*Vonderharr* (CD Cal. No. CV-02-04920-GHK (2003)]

The Sereboffs shamelessly shrug off their own admission that it "is perhaps true as a matter of fairness" that "the funds in question 'belong in good conscience to the Plan.'" Brief for Petitioners at 21 (quoting the district court decision). Brazenly, but not surprisingly, the Sereboffs contend that "mere fairness" is the "wrong criteria" for the analysis. *Id.* "Mere fairness" they contend can be avoided if the Court

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(Cont'd)

West, 103 Colum. L. Rev. 1317, 1366 (2003) (such rules are a "favorite of the plaintiffs' tort bar, because they increase aggregate recoveries, allowing a plaintiff to recover twice for the same injury: once from the health insurer or health plan and again from the tortfeasor or its insurer").

will simply adopt rules that in effect read core provisions of ERISA — such as the right to enforce the terms of a plan through appropriate equitable relief — out of existence. Certainly, a result in which fairness — a core value of our judicial system and of the common law trust principles underlying ERISA — cannot be achieved is to be avoided. Happily, that is not only possible, but was the clear intent of Congress in specifying that the terms of a plan may be enforced in equity. Just as the mere label of a remedy as "restitution" was not the final word on the nature of the claim, the mere existence of a reimbursement provision in a plan does not establish that the claim is one to enforce a contractual right. Nor is the result dictated by a need to prove fraud or wrongdoing or to engage in some legalistic tracing process not required in equity.

The Court last addressed reimbursement issues under Section 502(a)(3) of ERISA in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002). Since then, the Fourth, Fifth, Seventh and Tenth Circuits have ruled that plans may seek reimbursement from participants who have recovered from third parties because such relief was "typically available in equity." *Id.*, at 210 (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993).

The Sixth and Ninth Circuits, however, prohibit plans from seeking reimbursement under Section 502(a)(3). *Qualchoice v. Rowland*, 367 F. 3d 638 (CA6 2004); *Vonderharr*, 384 F. 3d 667 (CA9 2004). The Ninth Circuit, like the Sixth Circuit, not only holds that reimbursement actions are legal as opposed to equitable, but without any support has determined that a constructive trust can be established only where there is proof of fraud or wrongdoing. *FMC Corp. v. Owens*, 122 F. 3d 1258, 1261 (CA9 1997).

The reasoning of these two Circuits (which differs) and the result of these cases is contrary to ERISA, to *Knudson*, to reasonable healthcare policy, and to common sense. Were additional circuits to adopt this minority rule, plans in those circuits, as in the Sixth and Ninth Circuits, would be deprived of an important tool to reduce the prohibitive cost of continuing to provide meaningful benefits to their participants and beneficiaries. As noted by the U.S. Department of Labor in a recent amicus brief in *BlueCross BlueShield v. Carillo*, No. 05-13344-JJ (CA11) (*http://www.dol.gov/sol/media/briefs/Carillo(A)-9-14-05.htm*) (last accessed February 22, 2006) (case still pending), "[b]y following the Sixth and Ninth Circuits and flatly prohibiting such recoveries, the district court's decision is likely to have a large economic impact on healthcare plans in this Circuit, and may lead some employers to respond by dropping or decreasing coverage."[5] Unfortunately, without enforceable reimbursement provisions, some plans literally are one catastrophic accident away from bankruptcy.

SUMMARY OF ARGUMENT

The Trust urges the Court to affirm the Fourth Circuit's decision in this case by clarifying that "appropriate equitable relief . . . to enforce . . . the terms of the plan" under the provisions of ERISA Section 502(a)(3)(B) includes relief that enforces a term requiring a participant to reimburse medical expenses advanced by the plan where the participant recovers money from a third-party tortfeasor and holds such a payments in an identifiable fund. This Court already has strongly suggested that this is correct by indicating in

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5. *See e.g., http://www.opeiufunds.org/pdf/summary_plan_description.pdf*, at 49 (section captioned "Assignment and Reimbursement to Fund of Benefit Payments for Accident or Injury") (significantly limiting benefits where a third party is responsible for healthcare costs) (last accessed on December 8, 2004).

Knudson that "restitution in equity" was "typically available in equity," but held that such a remedy was not available in that case because the participant no longer possessed the funds. *Knudson*, 534 U.S., at 213-214. Whether the participant still possessed the funds was relevant only because a reimbursement claim pursuant to the terms of a plan *is an equitable claim* cognizable under Section 502(a)(3)(B). Consequently, the Trust urges the Court to clarify this point by (1) reversing the Sixth and Ninth Circuits' rulings that reimbursement actions are legal contract enforcement claims seeking damages; (2) reversing the Ninth Circuit's determination that a constructive trust is appropriate only where fraud or wrongdoing occurs when benefits are paid; and (3) declining to enforce an unsupported tracing requirement.

ARGUMENT

When the plaintiff asserts a constructive trust claim he asserts what is traditionally viewed as an equitable claim. The case is therefore tried as an equity case, without a jury.

1 Dan B. Dobbs, Law of Remedies § 4.3(2), at 595 (1993) (emphasis added).

ERISA Section 502 (a)(3) authorizes a civil action "by a . . . fiduciary (A) to enjoin any act or practice which violates . . . the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of . . . the terms of the plan." 29 U.S.C. § 1132(a)(3). In *Knudson*, this Court held that "appropriate equitable relief" under section 502(a)(3) refers to "those categories of relief that were typically available in equity." 534 U.S., at 210 (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993)). The Court went on to say that

"for restitution to lie in equity, the action . . . must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.*, at 214. *Knudson* identified two specific remedies "typically available in equity": a constructive trust and an equitable lien. Finally, the Court also explained that a constructive trust may lie for "money or property" that (1) is "identified as belonging in good conscience to the plaintiff," (2) can "clearly be traced to particular funds or property," and (3) is "in the defendant's possession." 534 U.S., at 213. Under these principles, Mid Atlantic was entitled to a constructive trust, and thus this Court should affirm the Fourth Circuit's decision.

A. Plan Reimbursement Claims Seek Appropriate Equitable Relief to Enforce Plan Terms

A majority of the circuits addressing reimbursement claims after *Knudson* have concluded that Section 502(a)(3) permits imposition of a constructive trust over specifically identifiable funds in a plan participant's possession. Below, the Fourth Circuit affirmed the district court's grant of summary judgment to a plan fiduciary seeking reimbursement of medical benefits advanced on behalf of a plan participant. *Mid Atl. Med. Servs., LLC v. Sereboff*, 407 F. 3d 212 (CA4 2005). Mid Atlantic sought reimbursement of $74,869.37 from settlement funds the Sereboffs obtained in their state court action against the tortfeasors responsible for the automobile accident that caused the plan to pay medical benefits on the Sereboffs' behalf. The Sereboffs maintained the disputed amounts in segregated, identifiable investment accounts. Agreeing with the district court, the Fourth Circuit noted that, unlike *Knudson*, Mid Atlantic "seeks equitable restitution, as that term is used in [*Knudson*], because [Mid Atlantic] seeks to recover funds that are specifically identifiable, belong in good conscience to [Mid Atlantic], and are within the possession and control of the Sereboffs."

Sereboff, 407 F. 3d, at 218; *see also Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan v. Willard*, 393 F. 3d 1119, 1121-1125 (CA10 2004); *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrought*, 354 F. 3d 348, 355-358 (CA5 2003), *cert. denied*, 541 U.S. 1072 (2004). The Second Circuit also has acknowledged in *dicta* that a claim for equitable restitution would lie where a defendant holds funds that in good conscience belong to the plaintiff. *See Gerosa v. Savasta & Co., Inc.*, 329 F. 3d 317, 321 (CA2), *cert. denied*, 540 U.S. 967 (2003).

In other rulings, courts have allowed a plaintiff to seek a constructive trust over the proceeds of funds "belonging in good conscience" to the plan. *Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health & Welfare Fund v. Varco*, 338 F. 3d 680, 687 (CA7 2003), *cert. denied*, 542 U.S. 945 (2004); *see also Forsling v. J.J. Keller & Assocs., Inc.*, 241 F. Supp. 2d 915, 917 (ED Wis. 2003); *Allison v. Wellmark, Inc.*, No. C00-3015-MWB, 2002 WL 31818946, at *9 (ND Iowa Oct. 15, 2002); *IBEW-NECA SW. Health & Benefit Fund v. Douthitt*, 211 F. Supp. 2d 812, 815 (ND Tex. 2002), *aff'd*, 98 Fed. Appx. 306 (CA5 2004); *Bauer v. Gylten*, Nos. A3-00-161, A3-02-27, 2002 WL 664034, at *3 (D ND Apr. 22, 2002) (permitting amendment of complaint to include a constructive trust claim, pursuant to *Knudson*).

Finally, other courts, although not imposing constructive trusts, have held that ERISA plan fiduciaries state a valid claim for equitable reimbursement when disputed monies can clearly be traced to particular funds or property in the possession of a defendant other than the participant. For instance, the District Court for the District of Columbia held that a recovery agent's claim for restitution constitutes a claim for equitable relief when a portion of the settlement funds are being held in trust by the beneficiary's former attorney "for the precise purpose of reimbursing the Plan." *Primax*

Recoveries, Inc. v. Lee, 260 F. Supp. 2d 43, 48 (DDC 2003). Likewise, the District Court for the Southern District of Iowa held that an insurer properly states a claim for equitable restitution where the settlement funds are being held in an attorney's trust account. *Wellmark, Inc. v. Deguara*, 257 F. Supp. 2d 1209, 1216 (SD Iowa 2003) ("This Court finds the possession theory is the correct read of *Great-West*. That is, attempts by an ERISA plan or insurer to recover settlement proceeds to which it is entitled under a subrogation or reimbursement provision are only prohibited under § 502(a)(3) if the insured is not in the possession of clearly identifiable proceeds."). These cases are in keeping with the Supreme Court's view that "Section 502(a)(3) admits of no limit . . . on the universe of possible defendants. Indeed, § 502(a)(3) makes no mention at all of which parties may be proper defendants." *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 246 (2000).

Almost all of the cases denying claims for reimbursement involved monies that could not clearly be traced to particular funds in the defendant's possession, and therefore are not factually similar to the present case. In some cases, the funds were no longer clearly identifiable because they had been disbursed and dissipated. *See, e.g., Bauhaus USA, Inc. v. Copeland*, 292 F. 3d 439 (CA5 2002) (disputed funds were not in the defendant participant's possession because the settlement proceeds had been placed into a special needs trust); *Asbestos Workers Local No. 42 Welfare Fund v. Brewster*, 227 F. Supp. 2d 226 (D Del. 2002) (relief denied since settlement funds not specifically identifiable). In other cases, the funds were not in the defendant's possession because the beneficiary had not yet settled or obtained a judgment against the third party tortfeasor. *See Primax Recoveries Inc. v. Goss ex rel. Goss*, 240 F. Supp. 2d 800 (ND Ill. 2002); *Extendicare v. Crow*, No. Civ.A. 1:02-CV-109-C, 2002 WL 32079263 (ND Tex. Oct. 23, 2002); *Primax*

Recoveries Inc. v. Carey, 247 F. Supp. 2d 337, 342 n.5 (SDNY 2002) ("[A] constructive trust [is] an inappropriate remedy . . . when the 'settlement proceeds' are in nobody's possession, because they are the entirely hypothetical fruit of a potential future settlement that does not yet exist and may never come into being at all."). *But see Primax Recoveries Inc. v. Duffy*, 204 F. Supp. 2d 1111, 1113 (ND Ill. 2002) (allowing a lien on specific funds not yet received from underinsurance coverage).

Against this tide of authority — and in the face of *Knudson* — the Sixth and Ninth Circuits in *Qualchoice*, 367 F. 3d 638 (CA6 2004) and *Vonderharr*, 384 F. 3d 667 (CA9 2004) have rejected constructive trust actions *per se*, holding that the reimbursement right arose in contract and, therefore, the restitutionary remedy of constructive trust was in fact a legal remedy. Likewise, the Sereboffs assert that Mid Atlantic seeks "nothing more than compensatory damages for breach of contract — a classic action at law." Brief for Petitioners at 9. These arguments cannot survive scrutiny because they rest on the untenable notion that an action to enforce the terms of a plan necessarily is a contract claim. That claim must be rejected because Section 502(a)(3)(B) expressly authorizes "appropriate equitable relief" to "enforce" a plan's terms. Thus, if the existence of an express term in a plan meant that enforcing that term was an action at law for breach of contract, then no claim could be made under Section 502(a)(3)(B) for "equitable" relief.

Moreover, plans should not be penalized or restricted in enforcement remedies simply for expressly setting forth their terms. Under the Sereboffs' analysis, plans are forced into a Catch-22 by falling through a syllogistic trapdoor. If plans set forth a term for reimbursement in their plan documents, they will be enforcing a contract in any suit under Section 502(a)(3). Because all contract enforcement actions are legal, the reimbursement claim would then warrant dismissal.

Of course, if plans do not include a reimbursement term in their plan documents, they will never be enforcing — as required by Section 502(a)(3) — a plan term and thus not fall within the literal terms of that section. Therefore, under the Sereboffs' view of Section 502(a)(3), plans are damned if they do or damned if they don't set forth a reimbursement clause in their plan documents. This bizarre result which completely reads out Section 502(a)(3) from ERISA is clearly an outcome Congress never intended and cannot and should not be the law.

Furthermore, the fact that a plan seeks monetary recovery does not mean that the claim is one for damages. A constructive trust necessarily has as its object money or property. Here, the Sereboffs admit that Mid Atlantic has a superior moral claim to the funds. Pet. Brief at 21. Dobbs points out that the remedies of constructive trust and equitable lien were created at equity precisely to address such situations in which a plaintiff seeks to recover money or property that a defendant holds legal title to in an identifiable *res* (including a bank account) to which the plaintiff has a superior moral claim. 1 Dobbs, § 4.3(2) at 591, 595; *accord Knudson*, 534 U.S., at 213; *Harris Trust*, 530 U.S., at 250-251. According to Dobbs, "the constructive trust is only used when the defendant has a legally recognized right in a particular asset," and it is this right to specifically identifiable property that carries the action beyond the physical contours of the four corners of the contract that both of these circuits seemed to have felt constrained by. 1 Dobbs, § 4.3(2).

B. The Ninth Circuit's Rule Is Legally Unsupported And Effectively Precludes Recovery As Its Stringent Requirement Is Impossible To Satisfy

The Ninth Circuit, unfortunately, has gone one step further holding that a plan has no remedy under Section 502(a)(3) unless it can prove the commission of fraud or

wrongdoing *at the time it delivers funds to a defendant. FMC Corp.*, 122 F. 3d, at 1261. This theory was — or should have been — put to rest in *Harris Trust*, where this Court, quoting Dobbs, observed that "[t]he constructive trust is based on property, not wrongs." 1 Dobbs, § 4.3(2), at 597. The full passage from Dobbs' treatise explains:

> Sometimes it is still said that the constructive trust applies only to misdealings by fiduciaries in cases of fraud. But this is a misconception. The constructive trust is based on property, not wrongs. It proceeds on the notion that the defendant has legal title but that the plaintiff has the superior moral or equitable claim. This misconception probably arises in part from the trust language itself. The constructive trust terminology, like quasi-contract terminology at law, is an analogy only, but if taken literally can suggest a trust and hence a fiduciary. It also probably arises in part from the fact that in a few special cases, wrongdoing is relevant to the constructive trust. At any rate, the constructive trust is no longer limited to misconduct cases; it redresses unjust enrichment, not wrongdoing.[5]
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> 1 Dobbs, *supra*, § 4.3(2), at 597.

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5. *See also The Future of Private Pensions: Proceedings of the 2001 Annual Meeting of the Association of American Law Schools, Section on Employee Benefits*, 5 Emp. Rts. & Emp. Pol'y J. 351, 381 ("*Harris Trust* probably does mean that the extremely restrictive view of equitable relief which the Ninth Circuit has taken is overly narrow"); *see also* Lisa N. Bleed, *Enforcing Subrogation Provisions As "Appropriate Equitable Relief' Under ERISA Section 502(a)(3)*, 35 U.S.F.L. Rev. 727, 743 n.124 (2001) (explaining that *Harris Trust* did not suggest that wrongdoing is required for a valid § 502(a)(3) claim).

Despite the clear lack of any need to establish fraud or wrongdoing, the Ninth Circuit remains steadfast in holding to this standard. Indeed, even the Sixth Circuit does not accept this unsupported conclusion. *Rowland*, 367 F. 3d, at 649 ("Contrary to Rowland's assertions, a plaintiff is not necessarily required to prove wrongdoing by the defendant in order to obtain relief through imposition of a constructive trust or an equitable lien. [citing Dobbs] The constructive trust is based on property, not wrongs." (internal citations omitted)); *see also Wellmark*, 257 F. Supp. 2d, at 1214 n.7 (explaining that *Harris Trust* "did not limit recovery under Section 502(a)(3) to unlawfully transferred property").

With the emergence of the *Owens*' wrongdoing standard, the Ninth Circuit erected an insurmountable barrier that plans could never overcome in seeking reimbursement. This was no more apparent than in the two decisions the Ninth Circuit issued before this Court's ruling in *Knudson*. In 1999, the Ninth Circuit applied this rule in *Cement Masons v. Stone*, 197 F. 3d 1003 (CA9 1999), which involved a trust provision imposing an "automatic lien" on payments a participant received from a negligent third party tortfeasor. In *Stone*, the court applied the *Owens* wrongdoing requirement and dismissed the action because that requirement could not be met. In *Reynolds Metals Co. v. Ellis*, 202 F. 3d 1246 (CA9 2000), decided one year after *Stone*, the court completed its trilogy of reimbursement cases, by again applying *Owens* and rejecting the analysis showing to be *Owens* erroneous. As before, the fiduciary could not show that wrongdoing occurred in the initial transfer of benefits, and thus could not satisfy the Ninth Circuit's requirement of wrongdoing.

In 2002, this Court decided *Knudson* and held that plans could seek remedies typically available in equity to prosecute reimbursement claims under Section 502(a)(3). While the Court did not specifically disapprove of the Ninth Circuit's wrongdoing standard, it had no reason to do so given that it

had jettisoned that requirement two years before in *Harris Trust*. There, the Court (as just previously noted), quoting Dobbs, observed that the "constructive trust is about property not wrongs." In light of this observation and the absence of any mention of any wrongdoing standard in *Knudson*, it was clear that this Court would not requite the showing of wrongdoing in an action under Section 502(a)(3).

The Ninth Circuit, however, took *Knudson*'s silence on its wrongdoing standard as a license for concluding that the Court had not renounced it, leaving it a viable standard. This continued application of the wrongdoing standard resulted in predictable losses to every fiduciary suing for reimbursement in the Ninth Circuit since. *See Westaff v. Arce*, 298 F. 3d 1164, 1166-1167 (CA9 2002); *Honolulu Joint Apprenticeship & Training Cmte. of United Assoc. Loc. Un. No. 675 v. Foster*, 332 F. 3d 1234, 1237 (CA9 2003); *Providence Health Plan v. McDowell*, 361 F. 3d 1243, 1249-1250 (CA9 2004); *Vonderharr*, 384 F. 3d, at 672-673. In fact, in *Vonderharr*, the Ninth Circuit went so far as to note that *Knudson* somehow vindicated its view on the wrongdoing standard and that *Harris Trust*, a case whose facts involved some wrongdoing, still stood for the far-reaching proposition that its standard was correct. As noted by *Rowland* above and the excerpt from Dobbs, *Harris Trust* is hardly a basis for such a conclusion. If this Court remains silent on this wrongdoing standard, the Ninth Circuit will, as it has done in the post-*Knudson* era, continue to defeat plans' attempts at justifiable recovery. Should this persist, plans will be forced to consider capping, limiting, or delaying payment of benefits for accident victims.

In contrast, the principles relied on by the circuits accepting the possession theory follow the clear parameters of *Knudson*. This Court should reaffirm those guidelines and should specifically disapprove the rationale underlying the erroneous rulings of the Ninth Circuit. In particular, the Court

should emphasize that wrongdoing is not an essential element of a constructive trust claim under Section 502(a)(3). In doing so, the Court should use these renewed standards to affirm the court below and to establish a unified and consistent national legal standard regarding the scope and limitations of relief under Section 502(a)(3).

C. Tracing Requirements Do Not Bar Plan Reimbursement Claims

The Sereboffs claim that the Fourth Circuit's ruling failed to require Mid Atlantic to trace the funds it ultimately recovered from them. In their view, the funds Mid Atlantic sought were not the same as those originally paid to the healthcare providers who rendered medical services to the Sereboffs. As the Sereboffs see it, because the two sets of funds came from different sources, and because Mid Atlantic has not traced the funds it initially paid to the disputed funds the Sereboffs now hold, the relief the Fourth Circuit awarded was not that which was "typically available in equity."

The Sereboffs offer no (post-*Knudson*) authority to support this theory. Furthermore, the view that the Fourth Circuit ran afoul of tracing rules is flatly wrong. Relying on this Court's guidance in *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132 (1962), the court in *Scholastic Corp. v. Kassem*, 389 F. Supp. 2d 402, 414-415 (D Conn. 2005), considered and rejected an argument identical to that posed by Sereboffs':

> [E]ven though the funds held by Defendant[] are not the same funds that [plaintiff] paid to [the] health-care providers under the Plan, the tracing requirement for a constructive trust is surely met in this case under the Supreme Court's analysis in *Pearlman*.

In *Pearlman*, a general contractor failed to pay its subcontractors. The general contractor's surety paid the subcontractors in its place and then asserted "superior right and title [over the trustee in bankruptcy] to a fund withheld by the [landowner] out of earnings due the contractor." *Pearlman*, 371 U.S., at 133. This Court upheld the decision directing the trustee to pay over the fund, reasoning:

> Traditionally sureties compelled to pay debts for their principal have been deemed entitled to reimbursement, even without a contractual promise such as the surety here had. And probably there are few doctrines better established than that a surety who pays the debt of another is entitled to all the rights of the person he paid to enforce his right to be reimbursed.

Id., at 136-137. This Court held that the surety had an equitable interest in funds retained by the landowner to pay the contractor, and traced the surety's right to the fund as follows:

> The [landowner] had a right to use the retained fund to pay laborers . . . [who] had a right to be paid out of the fund; . . . the contractor . . . would have become entitled to the fund; . . . and . . . the surety, having paid the laborers . . . is entitled to the benefit of all these rights to the extent necessary to reimburse it.

Id., at 141 (quoted in 3 Dobbs, *supra*, § 12.20(3), at 470 n.2). Other treatises similarly follow this tracing rule. For instance, Palmer states that:

> Through tracing, a person who in the first instance would be entitled to the restitution of money or other property would be entitled to the restitution

> of *money* or other property is often permitted to assert his claim against a substituted asset—an asset which is traceable to or the product of such money or other property. The end result of tracing may be a decree for specific restitution of the traced asset. 1 George E. Palmer, Law of Restitution § 2.14, at 187-193 (1978).

Like Dobbs, Palmer clarifies that equitable tracing does not require a precise trail of assets or property as the Sereboffs suggest. *Id.*, at § 2.15. Instead, Palmer illustrates the concept that two sets of *res* do not run afoul of a remedy in equity with the example of life insurance proceeds: If a wrongdoer converts a plaintiff's money for use as life insurance premiums, the plaintiff can trace his or her recovery to the resulting life insurance (or second *res*) created by the wrongdoer's death. These rules, in particular the ones outlined in *Pearlman*, implicitly recognize the common sense notion that payments *on behalf of* a principal are also payments *to* the principal's creditors. Payments made by responsible third parties to the principal are essentially payment back to the plan, and such payments that create identifiable property are the *res* required for seeking a constructive trust remedy. These rules arise not only from ancient and longstanding rules of equity, they embody basic notions of pragmatism and common sense. Were it otherwise, plans, as discussed previously, would simply either reduce or eliminate coverage for third party injuries (including emergency care), leaving participants injured by third party tortfeasors to recover medical costs for themselves.

D. A Plan Need Not Show That It Lacks A Remedy At Law Where It Is Pursuing A Constructive Trust Theory Seeking Recovery Of Identifiable Property

The Sereboffs erroneously assert that a party seeking a constructive trust first must demonstrate the absence of an adequate remedy at law. Again, the Sereboffs cite no authority for this proposition. They also skip over the fact that if a remedy is "typically" available in equity, the typicality of that remedy in equity presupposes that the plaintiff cannot (or need not) avail itself of any legal remedy. *Bauhaus*, 292 F. 3d, at 439 (Weiner, J., dissenting) ("When the remedy of damages is not adequate at law, equitable remedies may be sought. This doctrine is so well established that it must be credited as one kind of relief that was 'typically available in equity' — the quintessential alternate equitable remedy that becomes available when legal remedies are inadequate or nonexistent."). Dobbs echoes this theme by observing that "[w]hen the plaintiff asserts a constructive trust claim he asserts what is traditionally viewed as an equitable claim. The case is therefore tried as an equity case, without a jury." 1 Dobbs, *supra*, § 4.3(2), at 595.

Dobbs expands on this notion in his discussion of how "substantive equitable rights" trump the need for any inquiry into the adequacy of a remedy at law. When the equity courts fashioned the new right of constructive trust, they did so to address the shortcomings of the ancient writ of assumpsit, which could only provide relief where the plaintiff held title to the property in question. A constructive trust was necessary to provide a remedy where plaintiffs, who lacked legal title to property they sought and who could claim entitlement to relief only on grounds that they rightfully were entitled to it, were barred from seeking replevin-like relief on a theory bottomed on assumpsit. *Id.*, at § 4.3(2), at 591, 595; *accord Knudson*, 534 U.S., at 213; *Harris Trust*, 530 U.S., at 250-

251 (noting that "[w]henever the legal title to property is obtained through means or under circumstances 'which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have any legal estate therein'" (citations omitted).)

According to Dobbs, when equity courts sought to establish new substantive rights, as with constructive trusts, they initially engaged in an inquiry where they "wish[ed] to know whether the injury to the plaintiff is a serious one and for this purpose may ask whether it is 'irreparable.'" 1 Dobbs, *supra*, § 2.5(2) at 128. Dobbs continues by noting that once the pre-merger courts settled on that issue and created new equitable rights like constructive trust, "the question of . . . adequate legal remedy passes from the picture" since the "substantive use of 'irreparable' is not related to the remedial question." *Id.* More specifically, the adequacy of law issue "has no application" where equitable rights such as constructive trust are involved because:

> [T]he constructive trust claim is different. It is not a claim based on a legal right. On the contrary, constructive trusts are needed because legal title is in the defendant. The plaintiff seeking a constructive trust does not assert a legal right but an equitable right. In this setting the adequacy of a legal remedy *seems irrelevant.*

Id., § 4.3(2), at 595 (emphasis added). Dobbs does, however, note that the constructive trust necessarily requires the existence of some *res*. He cautions that a claim dressed up as one for constructive trust that does not identify any specific property (like the claim in *Knudson*) will be deemed to be one seeking damages. However, claims such as those in this

case, which identify specific property in investment accounts, should enjoy "an unhindered access to equity for restitution." *Id.; see also Skretvedt v. E.I. Dupont de Nemours*, 372 F. 3d 193, 213-214 (CA3 2004) (distinguishing between equitable accounting which requires showing of inadequacy of legal remedy and constructive trust (over a *res*) which does not); *cf. Knudson*, 534 U.S., at 214 n.2 (noting that an accounting coupled with constructive trust claim is an equitable remedy permissible under Section 502(a)(3)).

E. The Fact That The Settlement May Not Be Earmarked To Reimburse Medical Costs Is Irrelevant

The terms of the Sereboffs' personal injury settlement is irrelevant to the issue of reimbursement. Mid Atlantic seeks to enforce a plan term that allows it to recover medical benefits paid from a settlement between plan participants and a third party tortfeasor. Under *Knudson*, the terms of that settlement agreement are immaterial. The inquiry instead becomes whether the "money or property" (1) is "identified as belonging in good conscience to the plaintiff," (2) can "clearly be traced to particular funds or property," and (3) is "in the defendant's possession." *Knudson*, 534 U.S., at 213. All three of these conditions are met here. The money in the investment accounts are clearly within the Sereboffs' possession. As discussed above, the amounts paid to the Sereboffs can be traced to those accounts. And, perhaps most significantly, as the Sereboffs concede (Pet. Brief at 21), the fact that Mid Atlantic paid for their medical care puts Mid Atlantic in a position to assert that the money belongs in good conscience to Mid Atlantic.

Any contrary rule would encourage the Sereboffs, and participants like them, to engage in the gamesmanship of structuring settlements to avoid payment of reimbursement costs to plans. This would lead to absurd results hardly

contemplated by Congress when enacting ERISA and would spawn satellite litigation by plans seeking to unearth the true intent underlying settlements, just as the IRS does in seeking to pierce fraudulent employment law settlements calling only for settlement of personal injuries. That result is bad policy and should not be law.

CONCLUSION

For these reasons, the Trust, as amicus, respectfully requests that the Court affirm the judgment of the Fourth Circuit Court of Appeals and issue a decision specifically disapproving the Ninth Circuit's rule requiring wrongdoing when seeking a constructive trust under Section 502(a)(3).

Respectfully submitted,

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SEREBOFF ET UX. *v.* MID ATLANTIC MEDICAL SERVICES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 05–260. Argued March 28, 2006—Decided May 15, 2006

Petitioner Sereboffs are beneficiaries under a health insurance plan administered by respondent Mid Atlantic and covered by the Employee Retirement Income Security Act of 1974 (ERISA). The plan provides for payment of covered medical expenses and has an "Acts of Third Parties" provision. This provision requires a beneficiary who is injured as a result of an act or omission of a third party to reimburse Mid Atlantic for benefits it pays on account of those injuries, if the beneficiary recovers for those injuries from the third party. The Sereboffs were involved in an automobile accident and suffered injuries. The plan paid the couple's medical expenses. The Sereboffs sought compensatory damages for the accident from third parties in state court. After the Sereboffs settled their tort suit, Mid Atlantic filed suit in District Court under §502(a)(3) of ERISA, seeking to collect from the Sereboffs' tort recovery the medical expenses it had paid on the Sereboffs' behalf. The Sereboffs agreed to set aside from their tort recovery a sum equal to the amount Mid Atlantic claimed, and preserve this sum in an investment account pending the outcome of the suit. The court found in Mid Atlantic's favor and ordered the Sereboffs to turn over the amount set aside. The Fourth Circuit affirmed in relevant part, and observed that the Courts of Appeals are divided on the question whether §502(a)(3) authorizes recovery in these circumstances. This Court granted review to resolve this disagreement.

Held: Mid Atlantic's action properly sought "equitable relief" under §502(a)(3). Pp. 3–11.

(a) A fiduciary may bring a civil action under §502(a)(3)(B) "to obtain . . . appropriate equitable relief . . . to enforce . . . the terms of the

plan." The only question here is whether the relief requested was "equitable." In *Mertens* v. *Hewitt Associates*, 508 U. S. 248, this Court construed §502(a)(3)(B) to authorize only "those categories of relief that were *typically* available in equity," and thus rejected a claim that this Court found sought "nothing other than compensatory *damages*." *Id.*, at 207–208. This Court elaborated on this construction of §502(a)(3) in *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U. S. 204, which involved a provision in an ERISA plan similar to the "Acts of Third Parties" provision in the Sereboffs' plan. Relying on such a provision, Great-West sought equitable restitution of benefits it had paid when Knudson recovered in tort from a third party. In considering whether §502(a)(3)(b) authorized such relief, this Court asked whether the restitutionary remedy Great-West sought would have been equitable in "the days of the divided bench," *id.*, at 212. This Court found that it would not have been equitable, because the funds Great-West sought were not in Knudson's possession but had been placed in a trust under California law. That impediment is not present here. Mid Atlantic sought identifiable funds within the Sereboffs' possession and control—that part of the tort settlement due Mid Atlantic under the ERISA plan and set aside in the investment account. Pp. 3–5.

(b) This Court's case law from the days of the divided bench confirms that Mid Atlantic's claim is equitable. In *Barnes* v. *Alexander*, 232 U. S. 117, attorney Barnes promised two other attorneys "one-third of the contingent fee" he expected in a case, *id.*, at 119. Based on "the familiar rul[e] of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing," *id.*, at 121, the Court found that Barnes' undertaking "create[d] a lien" upon the portion of the recovery due him from the client, *ibid.*, which the other attorneys could "follow . . . into [Barnes'] hands" "as soon as [the fund] was identified," *id.*, at 123. The "Acts of Third Parties" provision in the Sereboffs' plan, like Barnes' promise, specifically identified a particular fund distinct from the Sereboffs' general assets, and a particular share of that fund to which Mid Atlantic was entitled. Thus, Mid Atlantic could rely on a "familiar rul[e] of equity" to collect for the medical bills it had paid by following a portion of the recovery "into the [Sereboffs'] hands" "as soon as [the settlement fund] was identified," and imposing on that portion a constructive trust or equitable lien. *Ibid.*

The Sereboffs object that Mid Atlantic's suit would not have satisfied the strict tracing rules that they say accompanied equitable restitution at common law. But *Barnes* confirms that no such tracing requirement applies to equitable liens imposed by agreement or as-

Syllabus

signment, like that in *Barnes* itself. And *Knudson* did not endorse application of all restitutionary conditions, like the tracing rules the Sereboffs identify, to every action for an equitable lien under §502(a)(3). *Knudson* simply held that equitable restitution was unavailable because the funds Great-West sought were not in Knudson's possession.

The Sereboffs also argue that equitable relief is inappropriate, even under *Barnes*, because at the time they agreed to the plan terms, no fund existed in which they could grant Mid Atlantic an equitable interest. But *Barnes* explicitly disapproved of a rule requiring identification at the time a contract is made of the fund to which a lien specified in the contract attached.

The Sereboffs also claim that the rule announced in *Barnes* applies only to equitable liens claimed under an attorney's contingency fee arrangement. But *Barnes* did not attach any particular significance to the identify of the parties seeking recovery, and other cases of this Court, not involving attorneys' contingency fees, have applied the same "familiar rul[e] of equity" that *Barnes* did. See, *e.g.*, *Walker* v. *Brown*, 165 U. S. 654. Pp. 5–10.

(c) The Sereboffs' contention that the lower courts erred in allowing enforcement of the "Acts of Third Parties" provision, without imposing limitations that would apply to an equitable subrogation action, is rejected. Mid Atlantic's claim is not considered equitable because it is a subrogation claim. Rather, it is considered equitable because it is indistinguishable from an action to enforce an equitable lien established by agreement, of the sort epitomized by *Barnes*. Pp. 10–11.

407 F. 3d 212, affirmed in relevant part.

ROBERTS, C. J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 05–260

JOEL SEREBOFF, ET UX., PETITIONERS *v.* MID ATLANTIC MEDICAL SERVICES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[May 15, 2006]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In this case we consider again the circumstances in which a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA) may sue a beneficiary for reimbursement of medical expenses paid by the ERISA plan, when the beneficiary has recovered for its injuries from a third party.

I

Marlene Sereboff's employer sponsors a health insurance plan administered by respondent Mid Atlantic Medical Services, Inc., and covered by ERISA, 88 Stat. 829, as amended, 29 U. S. C. §1001 *et seq.* (2000 ed. and Supp. III). Marlene Sereboff and her husband Joel are beneficiaries under the plan. The plan provides for payment of certain covered medical expenses and contains an "Acts of Third Parties" provision. This provision "applies when [a beneficiary is] sick or injured as a result of the act or omission of another person or party," and requires a beneficiary who "receives benefits" under the plan for such injuries to "reimburse [Mid Atlantic]" for those benefits

from "[a]ll recoveries from a third party (whether by lawsuit, settlement, or otherwise)." App. to Pet. for Cert. 38a. The provision states that "[Mid Atlantic's] share of the recovery will not be reduced because [the beneficiary] has not received the full damages claimed, unless [Mid Atlantic] agrees in writing to a reduction." *Ibid.*

The Sereboffs were involved in an automobile accident in California and suffered injuries. Pursuant to the plan's coverage provisions, the plan paid the couple's medical expenses. The Sereboffs filed a tort action in state court against several third parties, seeking compensatory damages for injuries suffered as a result of the accident. Soon after the suit was commenced, Mid Atlantic sent the Sereboffs' attorney a letter asserting a lien on the anticipated proceeds from the suit, for the medical expenses Mid Atlantic paid on the Sereboffs' behalf. App. 87–90. On several occasions over the next 2½ years, Mid Atlantic sent similar correspondence to the attorney and to the Sereboffs, repeating its claim to a lien on a portion of the Sereboffs' recovery, and detailing the medical expenses as they accrued and were paid by the plan.

The Sereboffs' tort suit eventually settled for $750,000. Neither the Sereboffs nor their attorney sent any money to Mid Atlantic in satisfaction of its claimed lien which, after Mid Atlantic completed its payments on the Sereboffs' behalf, totaled $74,869.37.

Mid Atlantic filed suit in District Court under §502(a)(3) of ERISA, 29 U. S. C. §1132(a)(3), seeking to collect from the Sereboffs the medical expenses it had paid on their behalf. Since the Sereboffs' attorney had already distributed the settlement proceeds to them, Mid Atlantic sought a temporary restraining order and preliminary injunction requiring the couple to retain and set aside at least $74,869.37 from the proceeds. The District Court approved a stipulation by the parties, under which the Sereboffs agreed to "preserve $74,869.37 of the settlement

funds" in an investment account, "until the [District] Court rules on the merits of this case and all appeals, if any, are exhausted." App. 69.

On the merits, the District Court found in Mid Atlantic's favor and ordered the Sereboffs to pay Mid Atlantic the $74,869.37, plus interest, with a deduction for Mid Atlantic's share of the attorney's fees and court costs the Sereboffs had incurred in state court. See 303 F. Supp. 2d 691, 316 F. Supp. 2d 265 (Md. 2004). The Sereboffs appealed and the Fourth Circuit affirmed in relevant part. 407 F. 3d 212 (2005). The Fourth Circuit observed that the Courts of Appeal are divided on the question whether §502(a)(3) authorizes recovery in these circumstances. See *id.*, at 219–220, n. 7.[1] We granted certiorari to resolve the disagreement. 546 U. S. ___ (2005).

II

A

A fiduciary may bring a civil action under §502(a)(3) of ERISA "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U. S. C. §1132(a)(3). There is no dispute that Mid Atlantic is a fiduciary under ERISA and that its suit in District Court was to "enforce . . . the terms of" the "Acts of Third Parties" provision in the Sereboffs' plan. The only question is whether the relief Mid Atlantic requested from the Dis-

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[1] Compare *Administrative Comm. of Wal-Mart Assoc. Health & Welfare Plan* v. *Willard*, 393 F. 3d 1119 (CA10 2004), *Bombardier Aerospace Employee Welfare Benefits Plan* v. *Ferrer, Poirot & Wansbrough*, 354 F. 3d 348 (CA5 2003), and *Administrative Comm. of Wal-Mart Stores, Inc.* v. *Varco*, 338 F. 3d 680 (CA7 2003), with *Qualchoice, Inc.* v. *Rowland*, 367 F. 3d 638 (CA6 2004), and *Westaff (USA) Inc.* v. *Arce*, 298 F. 3d 1164 (CA9 2002).

trict Court was "equitable" under §502(a)(3)(B).

This is not the first time we have had occasion to clarify the scope of the remedial power conferred on district courts by §502(a)(3)(B). In *Mertens* v. *Hewitt Associates*, 508 U. S. 248 (1993), we construed the provision to authorize only "those categories of relief that were *typically* available in equity," and thus rejected a claim that we found sought "nothing other than compensatory *damages*." *Id.*, at 255–256. We elaborated on this construction of §502(a)(3)(B) in *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U. S. 204 (2002), which involved facts similar to those in this case. Much like the "Acts of Third Parties" provision in the Sereboffs' plan, the plan in *Knudson* reserved "'a first lien upon any recovery, whether by settlement, judgment or otherwise,' that the beneficiary receives from [a] third party." *Id.*, at 207. After Knudson was involved in a car accident, Great-West paid medical bills on her behalf and, when she recovered in tort from a third party for her injuries, Great-West sought to collect from her for the medical bills it had paid. *Id.*, at 207–209.

In response to the argument that Great-West's claim in *Knudson* was for "restitution" and thus equitable under §502(a)(3)(B) and *Mertens*, we noted that "not all relief falling under the rubric of restitution [was] available in equity." 534 U. S., at 212. To decide whether the restitutionary relief sought by Great-West was equitable or legal, we examined cases and secondary legal materials to determine if the relief would have been equitable "[i]n the days of the divided bench." *Ibid.* We explained that one feature of equitable restitution was that it sought to impose a constructive trust or equitable lien on "particular funds or property in the defendant's possession." *Id.*, at 213. That requirement was not met in *Knudson*, because "the funds to which petitioners claim[ed] an entitlement" were not in Knudson's possession, but had instead been

placed in a "Special Needs Trust" under California law. *Id.*, at 207, 214. The kind of relief Great-West sought, therefore, was "not equitable—the imposition of a constructive trust or equitable lien on particular property—but legal—the imposition of personal liability for the benefits that [Great-West] conferred upon [Knudson]." *Id.*, at 214. We accordingly determined that the suit could not proceed under §502(a)(3). *Ibid.*

That impediment to characterizing the relief in *Knudson* as equitable is not present here. As the Fourth Circuit explained below, in this case Mid Atlantic sought "specifically identifiable" funds that were "within the possession and control of the Sereboffs"—that portion of the tort settlement due Mid Atlantic under the terms of the ERISA plan, set aside and "preserved [in the Sereboffs'] investment accounts." 407 F. 3d, at 218. Unlike Great-West, Mid Atlantic did not simply seek "to impose personal liability . . . for a contractual obligation to pay money." *Knudson*, 534 U. S., at 210. It alleged breach of contract and sought money, to be sure, but it sought its recovery through a constructive trust or equitable lien on a specifically identified fund, not from the Sereboffs' assets generally, as would be the case with a contract action at law. ERISA provides for equitable remedies *to enforce plan terms*, so the fact that the action involves a breach of contract can hardly be enough to prove relief is not equitable; that would make §502(a)(3)(B)(ii) an empty promise. This Court in *Knudson* did not reject Great-West's suit out of hand because it alleged a breach of contract and sought money, but because Great-West did not seek to recover a particular fund from the defendant. Mid Atlantic does.

B

While Mid Atlantic's case for characterizing its relief as equitable thus does not falter because of the nature of the recovery it seeks, Mid Atlantic must still establish that

the basis for its claim is equitable. See *id.*, at 213 (whether remedy "is legal or equitable depends on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought"). Our case law from the days of the divided bench confirms that Mid Atlantic's claim is equitable. In *Barnes* v. *Alexander*, 232 U. S. 117 (1914), for instance, attorneys Street and Alexander performed work for Barnes, another attorney, who promised them "one-third of the contingent fee" he expected in the case. *Id.*, at 119. In upholding their equitable claim to this portion of the fee, Justice Holmes recited "the familiar rul[e] of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing." *Id.*, at 121. On the basis of this rule, he concluded that Barnes' undertaking "create[d] a lien" upon the portion of the monetary recovery due Barnes from the client, *ibid.*, which Street and Alexander could "follow . . . into the hands of . . . Barnes," "as soon as [the fund] was identified," *id.*, at 123.

Much like Barnes' promise to Street and Alexander, the "Acts of Third Parties" provision in the Sereboffs' plan specifically identified a particular fund, distinct from the Sereboffs' general assets—"[a]ll recoveries from a third party (whether by lawsuit, settlement, or otherwise)"—and a particular share of that fund to which Mid Atlantic was entitled—"that portion of the total recovery which is due [Mid Atlantic] for benefits paid." App. to Pet. for Cert. 38a. Like Street and Alexander in *Barnes*, therefore, Mid Atlantic could rely on a "familiar rul[e] of equity" to collect for the medical bills it had paid on the Sereboffs' behalf. *Barnes*, *supra*, at 121. This rule allowed them to "follow" a portion of the recovery "into the [Sereboffs'] hands" "as soon as [the settlement fund] was identified," and impose on that portion a constructive trust or equitable lien. 232 U. S., at 123.

The Sereboffs object that Mid Atlantic's suit would not

have satisfied the conditions for "equitable restitution" at common law, particularly the "strict tracing rules" that allegedly accompanied this form of relief. Reply Brief for Petitioners 8. When an equitable lien was imposed as restitutionary relief, it was often the case that an asset belonging to the plaintiff had been improperly acquired by the defendant and exchanged by him for other property. A central requirement of equitable relief in these circumstances, the Sereboffs argue, was the plaintiff's ability to "'trac[e]' the asset into its products or substitutes," or "trace his money or property to some particular funds or assets." 1-D. Dobbs, Law of Remedies §4.3(2), pp. 591, n. 10, 592 (2d ed. 1993).

But as the Sereboffs themselves recognize, an equitable lien sought as a matter of restitution, and an equitable lien "by agreement," of the sort at issue in *Barnes*, were different species of relief. See Brief for Petitioners 24–25; Reply Brief for Petitioners 11; see also 1 Dobbs, *supra*, §4.3(3), at 601; 1 G. Palmer, Law of Restitution §1.5, p. 20 (1978). *Barnes* confirms that no tracing requirement of the sort asserted by the Sereboffs applies to equitable liens by agreement or assignment: The plaintiffs in *Barnes* could not identify an asset they originally possessed, which was improperly acquired and converted into property the defendant held, yet that did not preclude them from securing an equitable lien. To the extent Mid Atlantic's action is proper under *Barnes*, therefore, its asserted inability to satisfy the "strict tracing rules" for "equitable restitution" is of no consequence. Reply Brief for Petitioners 8.

The Sereboffs concede as much, stating that they "do not contend—and have never suggested—that any tracing was historically required when an equitable lien was imposed *by agreement*." *Id.*, at 11. Their argument is that such tracing was required when an equitable lien was "predicated on a theory of *equitable restitution*." *Ibid.* The

Sereboffs appear to assume that *Knudson* endorsed application of all the restitutionary conditions—including restitutionary tracing rules—to every action for an equitable lien under §502(a)(3). This assumption is inaccurate. *Knudson* simply described in general terms the conditions under which a fiduciary might recover when it was seeking equitable restitution under a provision like that at issue in this case. There was no need in *Knudson* to catalog all the circumstances in which equitable liens were available in equity; Great-West claimed a right to recover in restitution, and the Court concluded only that equitable restitution was unavailable because the funds sought were not in Knudson's possession. 534 U. S., at 214.

The Sereboffs argue that, even under *Barnes*, equitable relief would not have been available to fiduciaries relying on plan provisions like the one at issue here, because when the beneficiary agrees to such a provision "no third-party recovery" exists which the beneficiary can "place . . . beyond his control and grant [the fiduciary] a complete and present right therein." Brief for Petitioners 25–26 (internal quotation marks omitted). It may be true that, in contract cases, equity originally required identification at the time the contract was made of the fund to which a lien specified in the contract attached. See, *e.g.*, *Trist* v. *Child*, 21 Wall. 441, 447 (1875) ("[A] mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an appropriation of the fund *pro tanto*"). But *Barnes* explicitly disapproved of this rule, observing that *Trist* addressed the issue only in dicta (since the contract containing the lien provision in *Trist* was illegal), and treating the "question as at large," even in light of earlier opinions that had dealt with it head on. *Barnes*, *supra*, at 120 (citing *Trist*, *supra*; *Christmas* v. *Russell*, 14 Wall. 69 (1872); *Wright* v. *Ellison*, 1 Wall. 16 (1864)).

Apart from those cases, which *Barnes* discredited, the

Sereboffs offer little to undermine the plain indication in *Barnes* that the fund over which a lien is asserted need not be in existence when the contract containing the lien provision is executed. See 4 S. Symons, Pomeroy's Equity Jurisprudence §1236, pp. 699–700 (5th ed. 1941) ("[A]n agreement to charge, or to assign . . . property not yet in existence," although "creat[ing] no legal estate or interest in the things when they afterwards come into existence . . . does constitute an equitable lien upon the property" just as would "a lien upon specific things existing and owned by the contracting party at the date of the contract"); *Peugh* v. *Porter*, 112 U. S. 737, 742 (1885) ("[I]n contemplation of equity, [it] is not material" that the "very fund now in dispute" was "not . . . in existence" when an equitable lien over that fund was created). Indeed, the most they can muster in this regard are several state cases predating *Barnes* and a single decision that rests, contrary to the Sereboffs' characterization, on the simple conclusion that a contractual provision purporting to secure an equitable lien did not properly do so. See Brief for Petitioners 26; Reply Brief for Petitioners 12; *Taylor* v. *Wharton*, 43 App. D. C. 104 (1915).

The Sereboffs finally fall back on the argument that *Barnes* announced a special rule for attorneys claiming an equitable lien over funds promised under a contingency fee arrangement. Outside of this context, they say, the "typical rules regarding equitable liens by assignment" persisted and would have prevented recovery here. Reply Brief for Petitioners 13.

But *Barnes* did not attach any particular significance to the identity of the parties seeking recovery. See 232 U. S., at 119. And as *Barnes* itself makes clear, other cases of this Court—not involving attorneys' contingency fees—apply the same "familiar rul[e] of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to

the thing." *Id.*, at 121. In *Walker* v. *Brown*, 165 U. S. 654 (1897), for instance, the Court approved an equitable lien over municipal bonds transferred to a company to facilitate its business. When a supplier of the company suspended shipments because of delinquent debts, the individual who had transferred the bonds assured the supplier that "'any indebtedness that they may be owing you at any time, shall be paid before the return to me of these bonds . . . and that these bonds . . . are at the risk of the business of [the company], so far as any claim you may have against [it].'" *Id.*, at 663. The Court found that this undertaking created an equitable lien on the bonds, which the supplier could enforce against the individual after the bonds had been returned to him when the company became insolvent. *Id.*, at 666. As in *Barnes*, the Court resolved the case by applying general equitable principles, stating that "[t]o dedicate property to a particular purpose, to provide that a specified creditor and that creditor alone shall be authorized to seek payment of his debt from the property or its value, is unmistakably to create an equitable lien." 165 U. S., at 666.

C

Shifting gears, the Sereboffs contend that the lower courts erred in allowing enforcement of the "Acts of Third Parties" provision, without imposing various limitations that they say would apply to "truly equitable relief grounded in principles of subrogation." Reply Brief for Petitioners 5. According to the Sereboffs, they would in an equitable *subrogation* action be able to assert certain equitable defenses, such as the defense that subrogation may be pursued only after a victim had been made whole for his injuries. *Id.*, at 5–6. Such defenses should be available against Mid Atlantic's action, the Sereboffs claim, despite the plan provision that "[Mid Atlantic's] share of the recovery will not be reduced because [the beneficiary] has not received the full damages claimed, unless [Mid Atlantic] agrees in writing to a re-

duction." App. to Pet. for Cert. 38a.

But Mid Atlantic's claim is not considered equitable because it is a subrogation claim. As explained, Mid Atlantic's action to enforce the "Acts of Third Parties" provision qualifies as an equitable remedy because it is indistinguishable from an action to enforce an equitable lien established by agreement, of the sort epitomized by our decision in *Barnes*. See 4 Palmer, Law of Restitution §23.18*(d)*, at 470 (A subrogation lien "is not an express lien based on agreement, but instead is an equitable lien impressed on moneys on the ground that they ought to go to the insurer"). Mid Atlantic need not characterize its claim as a freestanding action for equitable subrogation. Accordingly, the parcel of equitable defenses the Sereboffs claim accompany any such action are beside the point.[2]

* * *

Under the teaching of *Barnes* and similar cases, Mid Atlantic's action in the District Court properly sought "equitable relief" under §502(a)(3); the judgment of the Fourth Circuit is affirmed in relevant part.

It is so ordered.

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[2]The Sereboffs argue that, even if the relief Mid Atlantic sought was "equitable" under §502(a)(3), it was not "appropriate" under that provision in that it contravened principles like the make-whole doctrine. Neither the District Court nor the Court of Appeals considered the argument that Mid Atlantic's claim was not "appropriate" apart from the contention that it was not "equitable," and from our examination of the record it does not appear that the Sereboffs raised this distinct assertion below. We decline to consider it for the first time here. See *National Collegiate Athletic Assn.* v. *Smith*, 525 U. S. 459, 470 (1999).